



San Francisco Law Library

No.

Presented by

.....

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

812811

No. 2257

United States
Circuit Court of Appeals
For the Ninth Circuit.

LESTER TURNER, SUTCLIFFE BAXTER and EDGAR
AMES, as Trustees of WESTERN STEEL CORPO-
RATION, Bankrupt,

Appellants,

vs.

METROPOLITAN TRUST COMPANY OF THE CITY
OF NEW YORK, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Western District of Washington, Northern Division.

FILED

APR 15 1913

Records of U.S. Circuit
and of appeals

F12

United States
Circuit Court of Appeals
For the Ninth Circuit.

LESTER TURNER, SUTCLIFFE BAXTER and EDGAR
AMES, as Trustees of WESTERN STEEL CORPO-
RATION, Bankrupt,

Appellants,

vs.

METROPOLITAN TRUST COMPANY OF THE CITY
OF NEW YORK, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Western District of Washington, Northern Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of Brayton Ives.....	44
Affidavit of Andrew J. McCormack.....	55
Assignment of Errors in the Entry of the Order of February 27, 1913, Re Claims of Metro- politan Trust Company.....	72
Bond of Western Steel Corporation.....	59
Certificate of Clerk U. S. District Court to Tran- script of Record.....	78
Certificate and Return of Referee in Bank- ruptcy.....	14
Citation on Appeal (Copy).....	76
Citation on Appeal (Original).....	79
Letter Dated August 1, 1911—Second Vice- president to James A. Moore.....	53
Memorandum Decision.....	64
Names and Addresses of Counsel.....	1
Note for \$600,000 Dated April 1, 1911, Western Steel Corporation to Metropolitan Trust Co.....	50
Order Authorizing Payment of Expenses of Publication of Notices of Sale.....	61

Index.	Page
Order Directing Payment of the Sum of \$7,000 to Metropolitan Trust Company.....	62
Order of Referee upon Trustees' Objections to Claims of Metropolitan Trust Company....	8
Order Reversing Order of Referee upon Objec- tions to Claim of Metropolitan Trust Com- pany of the City of New York, and Allowing Such Claim.....	69
Petition for and Order Allowing Appeal.....	75
Petition for Review of Order of Referee upon Objections to Claims of Metropolitan Trust Company Made and Entered April 1, 1912..	12
Report of Appraisers.....	35
Statement of Agreed Facts.....	17
Trustees' Objections to Claims of Metropolitan Trust Company.....	1

Names and Addresses of Counsel.

Messrs. MUNN & BRACKETT, Attorneys for Trustees and Appellants,

803 Alaska Building, Seattle, Washington.

Messrs. BAUSMAN & KELLEHER, Attorneys for Metropolitan Trust Company, Claimant,

1408 Hoge Building, Seattle, Washington.

[3*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Trustees' Objections to Claims of Metropolitan Trust Company.

To the Honorable JOHN P. HOYT, Referee in Bankruptcy, come now your trustees, Lester Turner, Sutcliffe Baxter and Edgar Ames, and present the following facts:

I.

That on or about the 1st day of April, 1910, the bankrupt executed a certain Mortgage Trust Deed, covering certain real and personal property of the bankrupt, for the purpose of securing an issue of bonds in the sum of Two Million Dollars (\$2,000,000.00). That in the said Mortgage Trust

*Page-number appearing at foot of page of original certified Record.

Deed the Carnegie Trust Company and Lawrence A. Ramage were named as trustees. That on or about the first day of June, 1911, the Metropolitan Trust Company of New York City became the trustee under said Mortgage Trust Deed by substitution.

II.

That on or about December 1, 1910, Metropolitan Trust Company of New York City loaned to the bankrupt the sum of Three Hundred Thousand Dollars, and on April 1, 1911, loaned to the bankrupt the additional sum of Three Hundred Thousand Dollars (\$300,000.00), taking the note of the bankrupt in the sum of Six Hundred Thousand [4] Dollars (\$600,000.00), covering all advances. That as a condition to the making of the said advances, Metropolitan Trust Company required the substitution of itself as trustee under the said Mortgage Trust Deed in place of Carnegie Trust Company and Lawrence A. Ramage. That since the making of the said advance of December 1, 1910, the said Metropolitan Trust Company has assumed to act and has acted as trustee under the Mortgage Trust Deed, as aforesaid.

III.

That the whole of the said Two Million Dollar (\$2,000,000) bond issue was deposited by the bankrupt with said Metropolitan Trust Company as trustee, and the said issue was pledged to the said Metropolitan Trust Company to secure the said Six Hundred Thousand Dollars advanced by it.

IV.

That thereafter, on or about the 29th day of Au-

gust, 1911, the said Metropolitan Trust Company, without any sufficient notice, caused the said Two Million Dollar bond issue to be offered for sale at public auction in foreclosure of its said pledge, and caused the said bonds to be bought in by itself for the sum of Twenty-five Thousand Dollars (\$25,000.00). That the amount for which the said bonds were sold was wholly inadequate and insufficient to vest in said Metropolitan Trust Company the ownership of the said bonds, with the right to enforce the same to the full amount.

V.

That Metropolitan Trust Company has filed herein its claim as an unsecured creditor in the sum of Five Hundred Eighty-two Thousand Nine Hundred Fifty-three Dollars (\$582,953.00), with interest [5] at the rate of six per cent (6%) from August 31, 1911. That the said claim is based upon the said note of the bankrupt in the sum of Six Hundred Thousand Dollars (\$600,000.00), dated April 1, 1911. That a copy of said note is attached to the said Proof of Claim. That the said Proof of Claim declares that the bonds pledged to secure the said note have been sold and the proceeds applied in reduction of the amount due upon the said note.

VI.

That in addition to the foregoing Proof of Claim upon the said note, the Metropolitan Trust Company has filed herein its Proof of Claim upon the said Two Million Dollars (\$2,000,000.00) of first mortgage bonds, with interest thereon in the sum of One Hundred Sixty-seven Thousand Five Hundred Dol-

lars (\$167,500.00), demanding that its claim for that amount be allowed and that the Mortgage Trust Deed be allowed as a lien to the full amount of the bonds upon the properties covered by the said Mortgage Trust Deed.

VII.

That at a creditors' meeting duly called for the purpose of considering in what manner the assets of the bankrupt's estate should be disposed of, an order was entered on the 17th day of February, 1912, directing all the assets of the bankrupt covered by the said Mortgage Trust Deed, together with other assets, to be offered for sale on March 15, 1912. That by the said order it was adjudged that Metropolitan Trust Company was the owner of the said Two Million Dollars (\$2,000,000.00) first mortgage bonds, and that upon the said sale it should be allowed to use the same in bidding and paying for the assets covered by the said Mortgage Trust Deed to the full face value thereof, on condition, however, [6] that the said Metropolitan Trust Company should deposit the said bonds, together with certain shares of stock in Western Coal & Iron Company, Ltd., with the referee and trustees respectively, and provided, further, that any creditor or other person aggrieved by the entry of said order, respecting the use of the said bonds, might file his petition contesting the right of said Metropolitan Trust Company to use said bonds in bidding and paying for the said assets to their full face value, and that upon the hearing of any such petition, the referee might modify the said order in respect to the use of the said bonds in any manner which law, jus-

tice and equity might require.

VIII.

That pursuant to said order, the said bonds were deposited with the referee and are now in the custody of the referee. That within the time prescribed in the said order, The First National Bank of Seattle, Washington, The Bank of Vancouver, of Vancouver, Province of British Columbia, and Standard Oil Company of New Jersey, filed herein their petition contesting the right of Metropolitan Trust Company to use said bonds in the manner prescribed in said order of February 17, 1912, and upon the said petition a hearing was had, the matter fully argued, and on March 2, 1912, an order entered by the referee herein finding that the proceedings taken by Metropolitan Trust Company in the foreclosure of its pledge were legally insufficient to vest in it as purchaser the ownership of the said Two Million Dollars (\$2,000,000.00) of bonds, discharged of its trust obligation, to hold the same as security under the pledge, and modifying the order of February 17, 1912, by limiting the amount to which the said bonds might be used in bidding and paying for the assets covered by the said Mortgage Trust Deed to the sum [7] of Six Hundred Fifty Thousand Dollars (\$650,000.00).

IX.

That at the said sale held on March 15, 1912, the highest and best bid for the assets covered by the said Mortgage Trust Deed was the bid of Metropolitan Trust Company in the sum of Six Hundred Forty-seven Thousand Ten Dollars (\$647,010.00), which bid was accepted by the trustees herein. That

by order entered on the 20th day of March, 1912, the said bid was approved, the sale confirmed and the trustees ordered to make conveyance upon the receipt of the amount bid in cash and the tender of said bonds for indorsement, as provided in the said Order of Sale, as modified. That pursuant to the said Order of Confirmation, your trustees have received from Metropolitan Trust Company the amount bid by it in cash, and have made conveyance of all properties covered by its said bid.

X.

That inasmuch as the proceedings taken by Metropolitan Trust Company in the foreclosure of its pledge were legally insufficient to vest in it title to said bonds, discharged of its trust obligation to hold the same as a pledge, securing the original loan of Six Hundred Thousand Dollars (\$600,000.00), and inasmuch as Metropolitan Trust Company in bidding and paying for the properties covered by said Mortgage Trust Deed has enforced the said bonds and received value thereon in the sum of Six Hundred Forty-seven Thousand Ten Dollars (\$647,010.00), which amount is in excess of the principal and interest due upon the said pledge obligation, it would be unjust and inequitable for the said Metropolitan Trust Company to receive further profit or advantage from [8] said original note of April 1, 1911, or from said bonds.

WHEREFORE, your trustees petition that a citation issue requiring Metropolitan Trust Company to appear and show cause why the said claims filed by it should not be rejected and the evidences of the same,

to wit, the note of the bankrupt dated April 1, 1911, in the sum of Six Hundred Thousand Dollars (\$600,000.00) and the Two Million Dollars (\$2,000,000.00) of First Mortgage Bonds of the bankrupt should not be surrendered up to the trustees and by them cancelled.

MUNN & BRACKETT,
Attorneys for Trustees.

United States of America,
State of Washington,
County of King,—ss.

Lester Turner, being first duly sworn, deposes and says that he is one of the duly appointed, qualified and acting trustees of Western Steel Corporation, Bankrupt; that he has read the foregoing petition, knows the contents thereof and believes the same to be true.

LESTER TURNER.

Subscribed and sworn to before me this 25th day of March, A. D. 1912.

[Seal]

S. M. BRACKETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Trustees' Objections to Claims of Metropolitan Trust Company. Filed in the United States District Court, Western Dist. of Washington, April 15, 1912. A. W. Engle, Clerk. By B. O. Wright. Filed March 26, 1912, 2 P. M. John P. Hoyt, Referee. [9]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORA-
TION,

Bankrupt.

**Order of Referee upon Trustees' Objections to
Claims of Metropolitan Trust Company.**

The trustees in the above bankruptcy proceedings having heretofore filed their objections to the claims of Metropolitan Trust Company, and their petition in said matter and a Citation having issued to Metropolitan Trust Company and Bausman & Kelleher, its attorneys, requiring said Metropolitan Trust Company to appear before the Referee in said bankruptcy proceedings at two o'clock P. M. on Friday, the 29th day of March, 1912, and then and there to show cause why an Order should not be entered by the Referee, requiring said Metropolitan Trust Company to surrender up to the trustees in bankruptcy for cancellation a certain note of the bankrupt, dated on or about April 1st, 1911, in the sum of Six Hundred Thousand Dollars (\$600,000.00), payable to Metropolitan Trust Company, and certain bonds of the bankrupt in the possession of the said Referee in an aggregate sum of Two Million Dollars (\$2,000,000.00) par value, and to show cause why the said claims of said Metropolitan Trust Company, based upon said note and bonds, should not be re-

jected, and the hearing upon said objections and said Citation having been regularly adjourned to the hour of ten o'clock A. M., on April 1st, 1912, the objectors, The First National Bank of Seattle, being present in court by its attorneys, Messrs. Hughes, McMicken, Dovell & Ramsey, and The Bank of Vancouver being [10] present in court by its attorneys, the Metropolitan Trust Company being present in court by its attorneys, Messrs. Bausman & Kelleher, and the trustees in bankruptcy being present in court by their attorneys, Messrs. Munn & Brackett, and there having been offered in evidence all the records and files in said bankruptcy proceedings, and by stipulation of the parties there having been considered by the referee the testimony heretofore introduced and considered by the referee at the hearing before said referee on the 9th day of March, 1912, which said hearing is referred to in the Modified Order of Sale entered herein on March 12th, 1912, and the Referee being in all respects fully advised, and the Referee finding that the bonds of the bankrupt were sold by said Metropolitan Trust Company, and by it purchased in the foreclosure of the pledge agreement without any fraudulent intent upon the part of Metropolitan Trust Company, but that the procedure followed by the Metropolitan Trust Company was legally insufficient to vest in it the legal title to said bonds, discharged of its trust obligation to hold the same as pledgee as security for the original amount loaned by it to the bankrupt, to wit, the sum of Six Hundred Thousand Dollars (\$600,000.00), together with interest and expenses; that under the Orders of

Sale entered herein and according to the bid of said Metropolitan Trust Company, it has paid for the assets and property of the bankrupt covered by the mortgage securing the bonds of the bankrupt the sum of Six Hundred Forty-seven Thousand Ten Dollars (\$647,010.00) in bonds of the bankrupt, and that said sum is equal to the total amount of the indebtedness of the bankrupt to said Metropolitan Trust Company evidenced, as aforesaid, by said note for Six Hundred Thousand Dollars (\$600,000.00),

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the note [11] of the bankrupt in the sum of Six Hundred Thousand Dollars (\$600,000.00), dated April 1st, 1911, and payable to Metropolitan Trust Company, and now in the possession of the Referee herein, be surrendered up to the trustees in bankruptcy for cancellation; that said note shall be cancelled by having written, indorsed or stamped thereon by said trustees, "Cancelled under terms of Order of Referee entered April 1st, 1912."

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the bonds of the bankrupt executed under date of October 1st, 1910, in favor of Carnegie Trust Company and Lawrence A. Ramage, trustees, of which bonds the Metropolitan Trust Company and James F. McNamara have become the substituted trustees, to wit, an issue of two thousand bonds of the par value of One Thousand Dollars (\$1,000.00) each, being in the aggregate sum of Two Million Dollars (\$2,000,000.00) of face value be surrendered up to the said trustees in bankruptcy

for cancellation, and that said bonds be cancelled by having written, indorsed or stamped on each of them, "Cancelled under terms of Order of Referee entered April 1st, 1912."

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the claims of the Metropolitan Trust Company based upon said note and said bonds be rejected in so far as the same exceed the purchase price aforesaid of said properties.

Witness my hand this 1st day of April, 1912.

JOHN P. HOYT,

Referee in Bankruptcy.

[Endorsed]: Order of Referee upon Trustees' Objections to Claims of Metropolitan Trust Company. Filed Apr. 1st, 1912, 2 P. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington. Apr. 15, 1912. A. W. Engle, Clerk. By B. O. Wright, Deputy.
[12]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORA-
TION,

Bankrupt.

Petition for Review of Order of Referee upon Objections to Claims of Metropolitan Trust Company Made and Entered April 1st, 1912.

To JOHN P. HOYT, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows as follows:

It is a creditor of Western Steel Corporation, the bankrupt above named, and its claim has been heretofore duly filed and allowed herein.

On the first day of April, 1912, an order was made and entered herein directing that the note of the bankrupt, in the sum of Six Hundred Thousand Dollars (\$600,000.00), dated April 1, 1911, and payable to Metropolitan Trust Company of the city of New York, and first mortgage bonds of the bankrupt of the par value of Two Million Dollars (\$2,000,000.00), be surrendered to the trustees in bankruptcy for cancellation, and that the claim of the Metropolitan Trust Company of the city of New York, based upon said notes and said bonds, be rejected in so far as the same have not been used in paying for the properties of this bankrupt, purchased by the Metropolitan Trust Company of the city of New York.

Said order is erroneous in fact and in law in its findings that the procedure followed by the Metropolitan Trust Company was legally insufficient to vest in it the legal [13] title to said bonds, discharged of its trust obligation to hold the same as pledgee as security for the original amount loaned by it to the bankrupt, and that Six Hundred and Forty-seven Thousand and Ten Dollars (\$647,010.00)

is equal to the total amount of the indebtedness of the bankrupt to the Metropolitan Trust Company, and is erroneous in law in that it orders that said note and bonds be canceled, and that the claim of the Metropolitan Trust Company thereon be rejected, and in that it fails to allow the claims of the Metropolitan Trust Company as heretofore filed herein, in full.

WHEREFORE your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed by the District Judge as provided by the Bankrupt Laws of the United States of General Order XXVII.

Dated this 9th day of April, 1912.

METROPOLITAN TRUST COMPANY
OF THE CITY OF NEW YORK.

By BAUSMAN & KELLEHER,

Its Attorneys. [14]

United States of America,
Western District of Washington,
County of King,—ss.

Frederick Bausman, being first duly sworn, on oath says: That he is one of the attorneys for the petitioner in the above-entitled action; that he has read the foregoing petition for review, knows the contents thereof and believes the same to be true; that he makes this affidavit because no officer of Metropolitan Trust Company is nearer to the place of holding of this court than the city of New York; that there is not sufficient time to obtain the verification of any officer of said company within the time fixed by this Court for the filing of this petition, and

that the matters stated therein are personally known to affiant, who makes this affidavit in behalf of petitioner herein named.

FRED'K BAUSMAN.

Sworn and subscribed to before me this 10th day of April, 1912.

[Seal]

R. C. GOODALE,

Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

Copy of the within Petition received and due service of same acknowledged, this 10th day of April, 1912.

MUNN & BRACKETT,

Attorneys for Trustees.

[Endorsed]: Petition for Review of Order of Referee upon Objections to Claims of Metropolitan Trust Company Made and Entered April 1, 1912. Filed April 10, 1912, 11 A. M. John P. Hoyt, Referee. Filed in the United States District Court, Western District of Washington, Apr. 15, 1912. A. W. Engle, Clerk. B. O. Wright, Deputy. [15]

[Certificate and Return of Referee in Bankruptcy.]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORA-
TION, a Corporation,

Bankrupt.

A petition for the review of the order made and filed herein on the 1st day of April, 1912, having been filed herein, the undersigned Referee in Bankruptcy before whom said matter is pending and who made said order, certifies and returns as follows, to wit:

That the matter involved in the order sought to be reviewed arose upon the petition filed by the trustees herein praying substantially for such an order as was so made and filed; that upon such hearing it was agreed in open court that the question of whether or not said petition should be granted and said order made should be submitted upon all of the files and records in the above-entitled proceeding, and upon such agreement it was so submitted. And the Referee being of the opinion that the attempted sale of the bonds referred to in said petition and order could not be sustained either as a private or public sale as provided for in the note to secure the payment of which said bonds were pledged, and it being further stipulated and agreed that the alleged owner of said bonds and of the indebtedness secured thereby had received payment thereon to an amount equal to such indebtedness. The referee was of the opinion that the reception of such sum had discharged the indebtedness so secured, and that the title to the bonds not having passed from the bankrupt by reason of the attempted foreclosure of the pledgee's lien, that all claims of the alleged owner of said indebtedness and said bonds had been satisfied, and that therefore the [16] evidence of such indebtedness and the bonds pledged to secure the same should be surrendered to the trustees for cancellation. The reason that the

Referee found that the attempted sale of the bonds could not be sustained as a private sale was that it was conceded in open court that the sale, though nominally to an outside party, was in fact a sale to the pledgee itself, and he was further of the opinion that it could not be sustained as a public sale, for the reason that the amount bid was not fairly commensurate with the value of the bonds, and for the further reason that the notice, under all the circumstances disclosed, was not a sufficient notice to entitle a sale by virtue thereof to stand as a public sale.

The Referee therefore returns herewith the said petition, which was the foundation of the order of April 1st, 1912, the said order and said petition for review, together with all the files and records herein, as constituting a sufficient certificate and return to enable a Judge of the above-named court to review said order.

Dated at Seattle, in said district, this 15th day of April, 1912.

JOHN P. HOYT,

Referee in Bankruptcy.

In view of the fact that while all of the records and files were in evidence upon the hearing hereinbefore referred to comparatively few of the very large number of papers on file have any bearing upon the question presented at such hearing, said Referee instead of actually transmitting all of said files as above stated respectfully refers thereto, and will transmit such portions thereof as counsel on either

side may desire to have considered by the Judge who reviews said order.

JOHN P. HOYT,
Referee in Bankruptcy. [17]

[Endorsed]: Certificate and Return. Filed in the United States District Court, Western District of Washington. Apr. 15, 1912. A. W. Engle, Clerk. B. O. Wright, Deputy. [18]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORA-
TION,

Bankrupt.

Statement of Agreed Facts.

WHEREAS, the Referee in Bankruptcy has filed his certificate herein upon the petition for review, and as the order here sought to be reviewed was made upon all the records and files in this cause, and as the same are very voluminous, for the purpose of supplementing the certificate filed herein by the Referee, in order that the Court may more easily pass upon the questions presented upon this petition, the following facts are agreed on between the counsel for petitioner and the counsel for trustees in bankruptcy;

1. In January, 1911, Western Steel Corporation, a Washington corporation, borrowed \$300,000.00

from Metropolitan Trust Company of the City of New York, and pledged \$1,800,000.00 par of its total issue of \$2,000,000.00 of mortgage bonds.

2. On the 1st day of April, 1911, it borrowed an additional \$300,000.00, pledging the remainder of its bond issue, as well as the \$1,800,000.00 par previously pledged, and executing a note for \$600,000.00 in the Trust Company's favor, dated April 1, 1911, and due August 1, 1911. On this note, James A. Moore, then president and a very large stockholder of the Steel Corporation, became guarantor. By the terms of this note the Trust Company possessed, among other powers as pledgee, the right upon nonpayment of the note at maturity to sell the collateral bonds at public or private sale, with or without notice, and the right itself to become a purchaser. A copy of this note is set out as Exhibit "A" to this agreed statement.
[19]

3. On its maturity, on the 1st of August, 1911, no part of the principal of this note was paid, and the Trust Company did send from New York the following letter, signed by its second vice-president:

"August 1, 1911.

"Mr. James A. Moore, President,
Western Steel Corporation,
Seattle.

Dear Sir:

I beg to call your attention to the fact that the note of your company for \$600,000, of which you are the guarantor, which became due and payable to-day, was not paid. I am instructed to notify you that if the same shall not be paid on or before Monday, Au-

gust 28, 1911, the securities therefor will be sold at public auction in this City, on Wednesday, August 30, 1911, and that in case there shall be a deficiency, this company will look to you to make good any loss.

Yours very truly,
BEVERLY CHEW,
2d Vice-President."

4. In response to this communication the Trust Company did receive the following reply:

"WESTERN STEEL CORPORATION.

Cable Address:

Weststeel.

Seattle, U. S. A.

August 11th, 1911.

Mr. Beverly Chew,

2d Vice-President,

Metropolitan Trust Co.,

49 Wall Street, New York.

Dear Sir:

Your favor of the 1st inst. to hand, advising me of the extension of time on the note of Western Steel to August 28th. I expect between now and that time to complete arrangements that will take up the note in full.

Thanking you for all your courtesy in this matter,
I am,

Yours very truly,

J. A. MOORE,
President.

JAM:A."

5. No part of this note was paid and the following proceedings were had by the Trust Company: It caused the aforesaid bonds to be advertised in the *New York Evening Post* on August 29, 1911, and in

the *New York Times* and *Wall Street Journal* on the morning of August 30, for sale by public auctioneers at half-past [20] twelve o'clock of that day in the city of New York, and caused notices of such sale to be mailed to the principal bond buyers, banking and financial corporations, firms and individuals in the financial district of New York City, and said sale was advertised and conducted as stated in the affidavit of Andrew J. McCormick, hereto annexed. The aforesaid Trust Company itself at the sale held as advertised at public auction became the purchaser of these bonds as the highest and best bidder therefor in the sum of \$25,000.00. This amount it credited upon the note of \$600,000.00, less the expenses of sale.

6. At the time of this sale, the bonds aforesaid had never been listed as standard securities, and concerning their value and concerning the properties which they covered, no definite information was possessed by the commercial world, and all that can be said of their actual worth is such as is disclosed in paragraphs 10, 11 and 12 of this agreed statement.

7. The newspapers in which sale was advertised are generally considered in the city of New York to be the best media for reaching bidders and buyers of stocks, bonds and financial securities generally, and one of them is the paper designated by Rule 27 of the United States District Court in Bankruptcy for the Southern District of New York as the paper for the publishing of notices of auction sales. The place where said sale was had is the place designated by Rule 62 of the General Rules of Practice of the Supreme Court of the State of New York for public

auction sales, and is a usual and proper place for such sales. Said bonds were sold at a regular auction sale held weekly at that time and place for the sale of stocks, bonds and financial securities, and largely attended by buyers of financial securities. The proceedings for the sale of these securities, the notice given, and the manner in which the sale [21] was advertised and conducted were those which are customary, regular, and usual in the sale of listed or known stocks, bonds and financial securities marketable in the city of New York. No steps were ever taken and no proceeding brought by Western Steel Corporation, James A. Moore, or any other person to attack or set aside the sale of said securities. The question of the validity of such sale was raised for the first time in the bankruptcy proceedings as hereinafter set forth.

8. October 26, 1911, the Steel Corporation was adjudicated a bankrupt in this Federal District Court, and thereupon the Trust Company did present its claim in bankruptcy as an unsecured creditor for the amount of the unpaid balance of the note for \$600,000. It did not at that time present any claim for the bonds, but did at all times assert its ownership of the bonds as separate obligations of the bankrupt.

9. The bonds aforesaid were of a total issue of \$2,000,000.00 face value, secured by general trust deed upon all the properties of the bankrupt, with Carnegie Trust Company and Lawrence A. Ramage as trustees for the bondholders. For these two trustees, Metropolitan Trust Company and James F.

McNamara, had become substitutes before and at the time of the loan of \$600,000.00 aforesaid, and still were trustees for the bondholders at the time of the proceedings in bankruptcy. The trust deed purported to cover all the properties of the bankrupt, but in so far as personalty was concerned was defective, in that it did not have the chattel mortgage affidavit required by the laws of the State of Washington, and as to personal property, save the shares of stock actually delivered in pledge thereunder, was not binding. The bonds were all of the same tenor, and in the form shown in Exhibit "B," hereto annexed, the same being one of the original bonds endorsed [22] with part payment and marked "cancelled" by order of the Referee.

10. The properties of the bankrupt consisted of:

(a) Sundry undeveloped mines, and iron ore, limestone, and other minerals in British Columbia, Washington, and Nevada, descriptions of which were available, but the values of which were wholly uncertain. Of those properties the Nevada iron property appraised at \$25,000.00 by the appraisers in bankruptcy was only partly paid for, the original owners claiming a vendor's lien thereon in the sum of approximately \$100,000.00, proceedings for the foreclosure of which are now under way.

(b) A steel manufacturing plant and blast furnace in the State of Washington, which was then, and had ever since its construction, and for more than a year been operated intermittently and unsuccessfully but under unfavorable conditions of management. This was then an experimental industry on Puget

Sound, no other steel plant being or having been in operation west of the Rocky Mountains, and the suitability of the plant's location, the adequacy and suitability of its construction and equipment, and the possibility of its profitable operation were then in doubt and dispute both in the commercial world generally and in New York, as well as in Seattle and in the State of Washington.

(c) A tract of land on Graham Island in British Columbia, Canada. This last asset, however, was not held directly by Western Steel Corporation. The interest of the latter company in this tract was as follows: Western Steel Corporation owned seven-eighths of the stock of a Canadian corporation called Western Coal & Iron Corporation, Limited. This Canadian corporation in turn was not the owner of the lands, but had a contract right to acquire them by option under deposited escrows in Victoria, British Columbia. [23] At the time of the sale of the securities in New York and of the bankruptcy in Seattle, there was due and payable upon these lands under pain of forfeiture of the escrows, \$250,000.00, and there had been paid in the past approximately \$150,000.00. The escrows call for annual payments of \$50,000.00, with six per cent per annum interest payable semi-annually upon the whole deferred principal, and provide for absolute forfeiture of all past payments and cancellation of the option in case of twenty days' default in payment of principal or interest. The shares of stock of the Western Steel Corporation in the Canadian Company, the Western Coal & Iron Corporation, Limited, were at the time

of the loan in New York and at the time of the sale of the bonds in New York, and at the time of the bankruptcy, directly deposited with the Trust Company and held by it in actual possession, and were as an asset correctly described in the trust deed as held for the security of the bondholders. The right of James A. Moore and Western Steel Corporation to the shares of stock in Western Coal & Iron Corporation, Limited, above described were, however, at the time of the sale of the bonds in New York City, and at the time of the bankruptcy proceedings, in litigation in the courts of British Columbia, and such litigation is still pending and undetermined.

11. At the time of the sale of the bonds in New York and also at the time of the bankruptcy in Seattle, the Graham Island tract was known to contain timber, and it was also supposed to contain a deposit of coal. The latter, however, had never been explored, and its value was hypothetic. The timber on the property, according to then available reports, was worth a good share of the purchase price remaining unpaid. At the time of the sale of the bonds in New York, and at the time of the commencement of the bankruptcy proceedings, there was due laborers employed on the plant at [24] Irondale approximately \$25,000.00, which sum constituted a lien upon said plant prior to the mortgage securing the bonds held by Metropolitan Trust Company. The patents for certain of the Quatsino Sound properties referred to in the appraisers' report were and are held by the company's barristers in the Province of British Columbia under attorneys' liens for ser-

vices on which they claim indebtedness of approximately \$2,500.00.

12. The appraisers in bankruptcy appraised the interest or equity of the bankrupt in the Graham Island property, as represented by the stock in Western Coal & Iron Corporation, Limited, held by the bankrupt and deposited with the Trust Company, as worth on a quick sale for cash the sum of \$200,000, explaining, however, in their report, a copy of which is attached hereto marked Exhibit "B," and by reference made a part of this paragraph, that the said property if developed in connection with the operation of the steel plant as a going concern, would be greatly enhanced in value above the figures named. The appraisers also valued the steel plant, blast furnace works and plant site, together with all machinery and equipment used in connection therewith, at \$99,035.00 on the basis of a quick sale for cash with the explanation that valued as a going concern properly financed, the same property, together with certain raw and finished material and supplies, would be worth \$399,942, as is more particularly set out in the said report. The valuation placed upon all assets of the company, both under and outside the mortgage amounted to \$458,141.00 estimated upon the basis of a quick sale for cash. The same properties, if the steel plant were operated as a going concern, adequately financed, the appraisers estimated would be worth an amount greatly in excess of the said total figure. All of which is in detail set out in the said appraisers' report. Appraisals of other properties are disclosed in said report, hereto annexed. [25]

13. In the bankruptcy aforesaid such proceedings were had that the Trust Company duly filed herein its proof of claim on said issue of \$2,000,000.00 of bonds, together with the entire issue of bonds, and the mortgage securing the same, praying that these, after crediting the amount for which the same should be used in paying for the properties covered by the mortgage and purchased at the bankruptcy sale, be allowed as a general claim against this estate. Thereafter sundry creditors instituted a controversy with the Metropolitan Trust Company in consequence of which the Referee therein did cause an order to be entered that the sale of the bonds in New York, though conducted with no fraudulent intent, had been insufficient to pass title to the Metropolitan Trust Company as purchaser, and that the latter company still held the bonds only as collateral to the original debt, with interest, and in making the order for the sale of the assets of the bankrupt, he permitted the Trust Company, in case it should be a bidder thereat, to use the bonds only in their collateral quality, but by reserving to the Trust Company the right, after the sale, to raise again the question of the validity of its purchase by auction in New York and its right to use the bonds as obligations in excess of the amount bid at the sale.

14. In the Order of Sale of the assets of the bankrupt corporation provision was made by the Referee for both lump and partial bids, and it was provided that that bid should be accepted which would be most advantageous to the estate. The sale of the assets of Western Steel Corporation as conducted,

approved and confirmed by this Court was by means of sealed bids addressed to the trustees in bankruptcy in care of the Referee, and by him opened in presence of the Referee at the time of sale. Notice of the sale was reasonable and sufficient, and was given by publishing the same [26] with a description of the property to be sold, and the terms, time, place and manner of sale as follows:

In the "Seattle Post-Intelligencer," ten insertions;

In the "Seattle Daily Times," ten insertions;

In the daily newspaper published in Jefferson County, Washington, ten times, and in other newspapers published in British Columbia and Nevada, all of said newspapers being of general circulation. The property was offered in twenty-nine several parcels. At the sale there was no lump bidder except the said Metropolitan Trust Company and only for a relatively trifling portion of the property were there partial bids by others than said Metropolitan Trust Company, these bids being received on thirteen out of the total of twenty-nine parcels so offered. None of the parcel bids above referred to were equal in amount to the bid of Metropolitan Trust Company for the corresponding parcel, and the Metropolitan Trust Company having bid on all the parcels severally and also on the entire property as a whole, its bid for the whole property was found to exceed the total of its bid for the several parcels. Under this order, the properties were bid in by the Trust Company and the sale confirmed in the sum of \$720,000.00, which sum the said Trust Company

was allowed to make payment of in its bonds to the extent of \$647,010.00, and in cash to the extent of \$72,990.00. Thereafter, upon petition of the trustee asking for cancellation of the original note of \$600,000 and of the entire issue of bonds upon the ground that the Trust Company, as the alleged owner of said bonds and of the indebtedness, had received payment thereon in an amount equal to such indebtedness through the use of said bonds at the sale aforesaid, the Referee reaffirmed his decision that the sale of said bonds in New York had been ineffectual to pass legal title to the Trust Company, and that it was entitled to use them only to the extent of their collateral [27] quality, and thereupon an order was entered cancelling the bonds and said original note. On this ruling, a petition for review was filed by the Trust Company and the matter brought before this Court. The affidavits of Andrew J. McCormick and of Brayton Ives, copies of which are hereto annexed and marked respectively Exhibit "C" and Exhibit "D," were a part of the evidence received by the Referee in behalf of Metropolitan Trust Company, and are made a part of the record herein for the consideration of this Court.

Agreed to by counsel for the Trust Company and for the Trustees in Bankruptcy, this 26th day of October, 1912.

BAUSMAN & KELLEHER,

Counsel for Metropolitan Trust Co.

MUNN & BRACKETT,

Counsel for Trustees in Bankruptcy.

[Indorsed]: Statement of Agreed Facts. [28]

REPORT OF THE APPRAISERS OF THE
WESTERN STEEL CORPORATION
JANUARY 8, 1912.

Having been appointed by the Court on the 17th day of December, 1911, and 5th of January, 1912, we forthwith proceeded to appraise as far as possible the working plant, the real estate, and the various mining properties of the Western Steel Corporation, a bankrupt,

We respectfully report to the Court as follows:

The time allowed for such appraisal has been absolutely too short to allow a personal inspection of any of the mining properties of the bankrupt. Their valuations have been established through opinion formed after exhaustive perusal of the mining reports of W. Price, M. E., and others, as well as after conversations with mining experts well conversant with the said properties, and with brokers making a specialty of selling mines, or timber, mainly in Vancouver, B. C.

We personally inspected Irondale, and we have taken an inventory of the plant, which has been kept in a good condition.

Our appraisal is based on the value of the assets if they are forced under the hammer; that is, on a cash basis. [29]

APPRAISAL.

- I. IRONDALE PLANT. (Blast
Furnaces, Open Hearth Fur-
naces, Rolling Mill.)

AND QUICK SALE VALUE.

Power Plant and equipment, also

Buildings and 20 acre site.....\$ 91,035.00

Raw and finished material and

supplies..... 15,504.50

\$106,539.50

(As a going concern this same
property would be worth \$391,-
942.)

- II. Chinese Pig Iron. Equity..... 11,396.00
- III. 30 acres of filled tideland, and
dock..... 15,000.00
- 750 shares of stock in the Western
Horse Shoe Manufacturing Co. No Value.

IV. IRONDALE TOWNSITE AND
OTHER REAL ESTATE.

Due to the amendment to the
sale of real estate to the bankrupt
by Moore in Nov. 1910, which re-
cites that the contracts receivable
from previous sales are excepted,
your appraisers have been unable
to distinguish accurately what
real estate belongs to-day to the
bankrupt or to Moore Inv. Co.
Many sales contracts have been
forfeited, many lots resold. It

will require the utmost scrutiny to appraise the value of whatever is left or belongs to the bankrupt of the original 1500 townsite lots, and 970 acres of land in and about Irondale, as carried on the books of the bankrupt. Under such conditions, your appraisers are unable to state the value of this real estate.

There is, however, some scattered pieces of land approximating 70 acres which unquestionably belongs to the bankrupt and on this property we place a valuation of 1,730.00

\$134,665.50

[30]

Brought forward..\$134,665.50

V. SNOHOMISH COUNTY IRON PROPERTIES.

(Mr. Jefferson, the vender, holds notes, we are told for \$2,000.00, unpaid, and the mining report on this property states that the best ore has been all taken away.

Under these conditions, we do not feel justified in placing any valuation whatever on this property.)

VI. SKAGIT COUNTY LIME PROPERTIES.

Owing to limited time and lack of satisfactory information your appraisers have been unable to appraise this property with any satisfaction as to accuracy, but we believe there is little of any value.

VII. QUATSINO SOUND IRON PROPERTIES.

30 full mineral claims, all of which are Crown Granted. If such is the case, and if there is blocked out on this property about 1,500,000 tons of ore and a probability of 5,000,000 tons more, which would cost \$.70 per ton at the tide water, as per report of W. Price, M. E., then, we appraise this property at..... 25,000.00

VIII. ASFORD COAL PROPERTIES.

The leases which cover these two properties (Northwestern Impr. Co., 20 years from April 16, 1907; royalty \$0.25 per ton.) (The Mashell Coal & Coke Co., 99 years from Jan. 29, 1908, royalties \$0.10, \$0.12, \$.015 per ton) are forfeited we are told. No royalties have [31] been paid to

Brought forward..\$159,665.50

the owners since October, 1910. Owing to the excessive charges of these contracts (minimum tonnage to be mined and heavy royalties) and owing to the underdeveloped state of the mines, your appraisers do not consider these leases to be of any value.

IX. (JACK ISLAND.) 10 acres.

We appraise this property at.. 250.00

X. NEVADA MINING PROPERTY (HEMATITE).

\$1,000 only has been paid on account. The consideration for that property was \$60,000 cash, \$65,000 in bonds, \$75,000 in stock; of which \$1,000 in cash, \$59,000 in Company's notes and \$75,000 in stock have been paid. This property has been deeded to the corporation. If there is a probability of 39,000,000 tons of ore, as per report of L. N. Dickman, in the absence of any other information other than the mining reports, your appraisers will put an appraisal of..... 25,000.00

XI. STEVENS COUNTY DOLOMITE.

The bankrupt holds a warranty deed to this property (6 acres) near Cheulah. W. Price reports

7,000,000 tons of dolomite a conservative estimate. We appraise this property at..... 2,500.00

XII. LOUISE ISLAND. Iron.

Purchased from J. B. Sword and H. K. Owens. We understand that the sale contract is forfeited. (Amount unpaid \$22,500.00.)

XIII. GRAHAM ISLAND PROPERTIES.

We regard this property as the most valuable [32] single asset

Brought forward..\$187,415.50

of the bankrupt, 20272½ acres, Crown Granted. A great deal of expensive development work is required before it would be possible to realize on these coal properties.

J. A. Burke, of Tacoma, cruiser, reports 553,617,000 feet of timber on the property (yellow cedar, spruce, hemlock, etc.).

We appraise the equity in this property at..... 200,000.00

XIV. Office furniture..... 1,000.00

XV. Accounts receivable—Equity.... 22,350.00

\$410,765.50

In conclusion, we think it is only fair to say and we respect-

fully submit that in the event of sufficient capital being provided to continue the operation of the plant, certain of the above mining properties, which are important if not indispensable, to the success of the steel industry on the Pacific Coast, would be greatly enhanced in value beyond the figures herein named.

R. AUZIAS TURENNE.

HUGH M. STREET.

T. E. HAYWOOD.

[Indorsed]: Appraisers' Report. Filed Jan. 10, 1912, 2. P. M. John P. Hoyt, Referee. [33]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN BANKRUPTCY—No. 4647.

In the Matter of WESTERN STEEL CORPORA-
TION,

Bankrupt.

Report of Appraisers.

Jan. 10, 1912.

We, the undersigned, having been heretofore duly appointed to appraise the real and personal property belonging to this estate, report as follows:

We have each of us personally and in great detail inspected and appraised the plant and property, real and personal, at Irondale, and we have taken an in-

ventory of that plant, which we find has been kept in good order.

In appraising this estate, we have been obliged to take into consideration the wide divergence between the value which the property would have if it were a going concern in successful operation and adequately financed and that which it is worth and will bring if placed upon the market under existing conditions.

Our appraisal is based upon the value of the assets for immediate sale for cash, but we have also stated for the information of creditors the valuation which we believe the Irondale plant would have as a going concern, if adequately financed and operated in connection with some of the other properties.

Owing to the advisability and necessity of a reasonable prompt appraisal of this property, and owing to the inaccessibility of some of the mineral properties during the winter months, it has been impossible for us to make [34] a personal inspection of the outlying mining properties belonging to this estate. Our estimates have been based upon opinion formed after consultation with experts conversant with these properties and with brokers making a specialty of dealing in similar properties, and after careful perusal of the reports of W. Price, M. E., and other mining engineers. We have made these inquiries with great care, both in this city and in Vancouver, B. C., devoting several days' time to such investigation of these outlying assets.

With reference to bankrupt's interest in Irondale real estate, bills and accounts receivable, pledged

materials, unadjusted claims, etc., we have been obliged to consult the bankrupt's report, putting our own valuations upon the various equities referred to in that report as assets.

APPRAISAL.

I. IRONDALE PLANT.

All buildings with blast furnace, open hearth furnaces, rolling mills, power plant, etc., in- cluding all machinery and equipment.....	\$ 89,035.00
20 acre tract appropriated for plant site including dock....	10,000.00
Raw and finished material and supplies	15,504.50
	<hr/>
	\$114,539.50

(Our valuation of this same property, as it stands, to any going concern adequately financed and properly managed, is placed at \$399,942.00.)

II. Approximately 20 acres filled tide land adjoining plant site on the North.....	5,000.00
[35]	

III. IRONDALE TOWNSITE & REAL ESTATE—NOT OTHERWISE SPECIFIED.

Due to the amendment to the contract of sale of real estate to the bankrupt by Moore in

November, 1910, which recites that the contracts of sale previous to that date are excepted, and owing to the confusion of the bankrupt's records, your appraisers have been unable to fix with any accuracy the present real estate holdings of the bankrupt at Irondale. Assuming, however, that all lots covered by forfeited sales contracts have already reverted to the bankrupt's estate, and that all sales contracts on which payments are to be made will, in the event of liquidation, be forfeited and the lots, likewise, revert to bankrupt's estate, then these real holdings amount to approximately 50 acres, which we appraise at \$2,500.00

(With the reorganization of the company, the continued operation of the plant, and confidence restored, the equity in this same property would have a valuation of \$38,000.00. This figure is subject, however, to some increase or deduction, according as Moore's modification of his agreement for the

transfer of this property is held valid or invalid. A more accurate appraisal of this property is not possible at this time.)

[36]

There are also some scattered pieces of land approximating 70 acres altogether which unquestionably belong to the bankrupt, and on this property we place a valuation of.....\$ 3,500.00

IV. 997 Shares of the Capital Stock of the Western Horseshoe Mfg. Co. As the property of this company is encumbered with a mortgage of \$25,000, we appraise the bankrupt's interest in same as of..... No Value

5 shares of the Capital Stock of the Northwestern General Hospital..... No Value

V. Equity in Accounts and Bills Receivable including Assigned Accounts and unadjusted claims..... 45,000.00

VI. Cash on hand..... 101.53

VII. Equity in Pledged Materials and Manufactured products.. 25,500.00

VIII. Machinery, Tools and Equipment at outlying properties,

	mainly at Ashford, Pierce Co., Washington.....	5,000.00
IX.	Office Furniture, Seattle.....	1,000.00

SNOHOMISH COUNTY IRON ORE PROPERTY.

- X. Consisting of 155 acres. Inas-
much as a mining report states
that all good ore has been
taken from this property, we
put a valuation upon it as
acreage at.....

1,000.00

[37]

XI. SKAGIT COUNTY LIME PROPERTY.

We have been reliably informed
that there is no lime rock of
any value on this property.

We, therefore, appraise this
property, approximately 40
acres, at.....\$

1,500.00

XII. QUATSINO SOUND IRON ORE PROPERTY.

It is reported to us that this
property consists of 30 full
mineral claims, all of which
are Crown granted. Basing
our valuation upon the report
of W. Price, M. E. which states
that there is blocked out on
this property about 1,500,000
tons of ore and a probability
of 5,000,000 tons more, costing

not to exceed 70c per ton mined
and delivered at tide water,
and recognizing only the spec-
ulative value of the property
under forced sale, we appraise
it at..... 25,000.00

XIII. ASHFORD COAL PROP- ERTIES.

Leases cover these two prop-
erties. (Northwestern Improve-
ment Co. 20 years from April
16, 1907; Royalty 25c per ton;
and the Mashell Coal & Coke
Co. 99 years from January 29,
1908; Royalties 10, 12, and
15c per ton.) No royalties
have been paid to the owners
since Oct. 1910. By reason of
the excessive and unwar-
ranted charges of these con-
tracts with respect to the
minimum tonnage to be mined
and heavy royalties, and con-
sidering the undeveloped state
of the mines, your appraisers
consider *these lease* as of.... No Value

[38]

XIV. JACK ISLAND SLIICA PROP- ERTY.

We appraise this property at...\$ 1,000.00

XV. NEVADA IRON ORE PROP- ERTY.

In the absence of any information concerning this property, other than one mining report, we are compelled to base our valuation upon a consideration of the agreed purchase price, and in connection therewith the probability of a cash sale within a reasonably short time, having in mind the elimination of the Bankrupt as a customer and recognizing only the purely speculative value of the property, under conditions of forced sale, we appraise this property at..... 25,000.00

XVI. STEVENS COUNTY DOLOMITE PROPERTY.

The bankrupt holds a Warranty Deed for this property (6 acres) near Chewelah, Wash., W. Price, M. E., reports 7,000,000 tons of Dolomite as a conservative estimate of the production to be obtained from this property. We appraise it at..... 2,500.00

XVII. LOUISA ISLAND IRON ORE PROPERTY.

Purchased from J. B. Sword and H. K. Owens. We understand the sales contract is forfeited. No Value

XVIII. GRAHAM ISLAND COAL & TIMBER PROPERTY.

We regard this property as the most valuable single asset of the Bankrupt. 20,272½ acres. Crown granted. A great deal of expensive development work [39] is required, however, before it will be possible to determine the real commercial value of the coal property.

Basing our valuation upon the timber cruise of Mr. J. W. Burke of Tacoma, Wash., who reports 553,000,000 ft. of spruce, yellow and red cedar, hemlock, etc., and recognizing the speculative value of indications of vast deposits of high grade coal, we appraise the equity in this property at 200,000.00

Total Quick Cash Sale Value...\$458,141.03

In conclusion, we think it is only fair to say, and we respectfully submit for the information of creditors that, in the event of sufficient capital being provided, to continue the operation of the plant, certain of the above mining properties which are important, if not indispensable, to the success of the steel industry on the Pacific Coast, would be greatly enhanced in value beyond the figures herein named.

Furthermore, it is our opinion that if sufficient time were allowed for promotion and negotiation, whether or not the plant at Irondale is operated, much higher prices for some of these outlying properties could be obtained.

R. AUZIAS TURENNE.

HUGH M. STREET.

T. E. HAYWOOD.

[Indorsed]: Supplemental Report of Appraisers Jan. 10, 1912. Filed Jan. 17, 1912, 2 P. M. John P. Hoyt, Referee. [40]

[Affidavit of Brayton Ives.]

EXHIBIT "C."

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. —.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

State of New York,

County of New York,

Southern District of New York,—ss.

At the city of New York, Southern District of New York, on the 4th day of November, 1911, came Brayton Ives of the city, county and State of New York, and made oath and says: That I am the President of the Metropolitan Trust Company of the city of New York, a corporation incorporated by and under the laws of the State of New York, and

carrying on business at No. 49 Wall Street, in the city, county and State of New York. The Western Steel Corporation, the bankrupt above named, is justly and truly indebted to the said Metropolitan Trust Company in the sum of Five Hundred and Seventy-eight Thousand Five Hundred and Four Dollars (\$578,504), with interest thereon at the rate of six per cent per annum from August 31, 1911, to October 11, 1911, amounting to Three Thousand Nine Hundred and Fifty-three and 11/100 Dollars (\$3,953.11), making in all the sum of Five Hundred and Eighty-two Thousand Four Hundred and Fifty-seven and 11/100 Dollars (\$582,457.11). The said debt exists upon and is the amount due and owing upon a certain promissory note made by the said Western Steel Corporation to the said Metropolitan Trust Company on or about [41] the 1st day of April, 1911. The said note was dated and delivered to the said Metropolitan Trust Company by the said Western Steel Corporation on the 1st day of April, 1911, and by it the said Western Steel Corporation promised to pay to the order of the said Metropolitan Trust Company on the 1st day of August, 1911, the sum of Six Hundred Thousand Dollars (\$600,000), with interest thereon at the rate of six (6) per cent per annum. A copy of said note, marked Exhibit "A," is hereto annexed and made a part of this affidavit. As stated in the said note, the said Western Steel Corporation deposited with the said Metropolitan Trust Company as collateral security for the payment thereof Two Million Dollars (\$2,000,000) Western Steel Corporation first mort-

gage six per cent. bonds. By the terms of the said note the said Metropolitan Trust Company was authorized upon the nonpayment of the same, when due, to sell, assign and deliver the whole of the said securities, or any part thereof, at any broker's board, or at public or private sale, at the option of the said Metropolitan Trust Company, without either advertisement or notice, which were thereby expressly waived, and if such securities or property were sold at public sale, the said Metropolitan Trust Company might itself purchase the whole or any part thereof free from any right of redemption on the part of the Western Steel Corporation, which was thereby waived and released, and in case of sale from any cause, after deducting all costs or expenses of every kind for collection, sale or delivery, the said Metropolitan Trust Company was authorized to apply the residue of the proceeds of the sale so made to pay the liability to the said Metropolitan Trust Company, and the said Western Steel Corporation agreed to be and remain liable to the said Metropolitan Trust Company for any deficiency arising [42] upon such sale. The said note was not paid at maturity, nor was any part of it. Thereupon the said Metropolitan Trust Company immediately notified the said Western Steel Corporation and James A. Moore, its President, the guarantor of the said note, that if it was not paid on or before Monday, August 28, 1911, the securities therefor would be sold at public auction in the city of New York on Wednesday, August 30, 1911, and that in case there should be a deficiency the Metropolitan Trust Company

would look to him to make good any loss. Hereto annexed, and marked Exhibit "B," and made a part hereof, is a copy of the letter by which they were so notified. The said letter was received by the said Western Steel Corporation and by the said James A. Moore, as appears by letter of the said Moore, as President of the said Western Steel Corporation, on letterhead of the said corporation, written from Seattle on August 11, 1911, which is hereto annexed, marked Exhibit "C," and made a part hereof. The said note was not paid on or before August 28, 1911, nor was any part of it. Accordingly, the said Metropolitan Trust Company directed that the said bonds be sold at public auction on the 30th day of August, 1911, and the same were so sold. The said sale was conducted by Adrian H. Muller & Son, auctioneers, at their regular auction sale of stocks and bonds held at the Exchange Sales Rooms, Nos. 14 and 16 Vesey Street, in the County and City of New York, on said 30th day of August, 1911. I have been actively engaged in the banking business in the City of New York for over forty years and am familiar with the customs in regard to the sales of securities at public auction. For many years a great majority of the public auction sales of stocks and bonds, such as the said bonds of the [43] Western Steel Corporation, which are not dealt in on the New York Stock Exchange, nor sold on the curb, have been conducted by said Adrian H. Muller & Son as auctioneers. Their sales take place Wednesdays at 12:30 o'clock. They send to financial institutions a list of the securities to be sold

and advertise the same in the newspapers, such as the "New York Times," which is the paper designated by rule 27 of the Rules of the District Court in Bankruptcy for the Southern District of New York as the paper for the publication and notice of auction sales, the Wall Street Journal and the "New York Evening Post," which are recognized as the best media for financial notices. Upon the list so sent around to financial institutions and so advertised in the said "New York Times," "Wall Street Journal" and "New York Evening Post" for the said sale on Wednesday, August 30, were the Two Million Dollars (\$2,000,000) Western Steel Corporation bonds hereinbefore referred to. The Exchange Sales Rooms, the place where the said sale was had, is the place designated by rule 62 of the General Rules of practice of the Supreme Court of the State of New York, adopted pursuant to section 94 of the Judiciary Law of the State of New York, the same being chapter 35 of the Laws of 1909 and the said section being a re-enactment of a similar provision theretofore contained in Article II of the first title of Chapter 1 of the Code of Civil Procedure of the State of New York for the sale of real estate at public auction, said rule providing, among other things, that "where lands in the County of New York * * * are sold under a decree, order or judgment of any Court, they shall be sold at public auction * * *. Such sales in the County of New York, unless otherwise specifically directed, shall take place at the Exchange Sales [44] Rooms now located at 14-16 Vesey Street, in the City of

New York." The sale that was had of the said bonds was had in the same way in which public auction sales of such bonds are customarily and regularly had.

The net proceeds of the sale for \$25,000 of the said collateral securities were the sum of Twenty-four Thousand Four Hundred and Ninety-six Dollars (\$25,496), which sum the said Metropolitan Trust Company has applied upon account of the amount due upon the said note as follows: Three thousand Dollars (\$3,000) to the payment of interest due on August 31, 1911, and Twenty-one Thousand Four Hundred and Ninety-six Dollars (\$21,496), upon the principal of said note, leaving now due and owing to the said Metropolitan Trust Company from the bankrupt herein the sum of Five Hundred and Seventy-eight Thousand Five Hundred and Four Dollars (\$578,504), with interest, as hereinbefore stated. The said Metropolitan Trust Company is and has always been the owner and holder of said note. The consideration of said note was money loaned to the said bankrupt by the said Metropolitan Trust Company on or about the 1st day of April, 1911.

No judgment has been rendered upon said indebtedness. No part thereof has been paid, except as hereinbefore stated. There are no setoffs or counterclaims to the same. The said Metropolitan Trust Company has not, nor has any person by its order, or to the knowledge or belief of deponent, for its use had or received any manner of security for said debt whatever, except as hereinbefore stated, and it now holds, and since prior to the making and filing of the

petition for adjudication of bankruptcy herein has held no [45] security therefor.

BRAYTON IVES.

Sworn and subscribed to before me this 4th day of November, 1911.

[Seal]

A. E. VOGLER,

Notary Public Kings County, N. Y.

Certificate filed in New York County. [46]

[Note, for \$600,000, Dated April 1, 1911, Western Steel Corporation to Metropolitan Trust Co.]

EXHIBIT "A."

\$600,000#.

New York, April 1st, 1911.

On August 1, 1911, for value received, the undersigned promise to pay to the order of The Metropolitan Trust Company of the City of New York, at its office in New York City, in funds, current at the New York Clearing House, with interest from the date hereof at the rate of 6 per cent per annum, Six hundred thousand # dollars; having deposited with the said company as collateral security for the payment of this and any other liability or liabilities of the undersigned or of the guarantors hereof to the said company, due or to become due, or which may hereafter be contracted or existing, the following property, viz.: \$2,000,000 Western Steel Corpu. 1st Mtg. Coll. 6% Bonds, of an estimated market value of \$——, and the undersigned also hereby giving to the said Company a lien for the amount of all the said liabilities upon all the property or securities at any time given unto or left in the possession or custody of the said company by or for the undersigned,

for safe keeping or otherwise, or in which the undersigned has (or have) any interest, and also upon the balance of the deposit account of the undersigned with the said company existing from time to time.

In case the securities at any time pledged for any of the above named liabilities should decline in market value or for any reason become unsatisfactory to the said company, the undersigned agree to deposit with the said company additional securities to the satisfaction of the said company; and in case of failure to do so forthwith, this note shall become at once due and payable without demand of payment thereof, and the said company may immediately sell and apply the said securities in the manner and with the effect as hereinafter provided.

The undersigned do hereby authorize and empower the said [47] company, at its option, at any time, to appropriate and apply to the payment and extinguishment of any of the above named obligations or liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in the hands of the said company, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due; and further agree that in the event of the insolvency of the undersigned all the said obligations and liabilities shall, at the option of the said Company, become and be immediately due and payable without demand of payment.

The said company is hereby authorized, upon the nonpayment of any of the liabilities above mentioned when due, to sell, assign and deliver the whole of the

said securities, or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto or left in the possession or custody of the said Company by or for the undersigned, at any Broker's Board or at public or private sale, at the option of the said company, without either advertisement or notice, which are hereby expressly waived.

If such securities or property are sold at public sale, the said company may itself purchase the whole or any part thereof, free from any right of redemption on the part of the undersigned which is hereby waived and released.

In case of sale for any cause, after deducting all costs or expenses of every kind for collection, sale or delivery, the said company may apply the residue of the proceeds of the sale or sales so made, to pay either one or more or all of the said liabilities to the said company, whether then due or not, as it shall deem proper, making proper rebate for interest on liabilities not then due, and returning the overplus, if any, to the undersigned who agree to be and remain [48] liable to the said company for any deficiency arising upon such sale or sales.

[Seal] (Signed) WESTERN STEEL CORPORATION,
By JAMES A. MOORE,
President.

(On Back of Exhibit "A.")

In consideration of the making, at the request of the undersigned, of the loan evidenced by the within note, upon the terms thereof, and of the sum of one

dollar, the undersigned hereby guarantee to The Metropolitan Trust Company of the City of New York, its successors, endorsees or assigns, the prompt payment of the said loan when due, and hereby consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan or any of the securities therefor extended, without notice to or further assent from the undersigned, and that the undersigned will remain bound upon this guarantee notwithstanding such changes, surrender or extension. The undersigned waive demand of payment from the maker of said note, and also waive notice of non-payment of the said loan or note, and also waive notice of any sale of the collateral securities held for the said note. [49]

[Letter, Dated August 1, 1911—Second Vice-president to James A. Moore.]

EXHIBIT "B."

COPY.

August 1, 1911.

Mr. James A. Moore, President,
Western Steel Corporation,
Seattle.

Dear Sir:

I beg to call your attention to the fact that the note of your company for \$600,000, of which you are the guarantor, which became due and payable to-day was not paid. I am instructed to notify you that if the same shall not be paid on or before Monday, August 28, 1911, the securities therefor will be sold at public auction in this city, on Wednesday, August 30, 1911,

and that in case there shall be a deficiency, this company will look to you to make good any loss.

Yours very truly,

2d Vice-president. [50]

“C.”

WESTERN STEEL CORPORATION.

Cable Address:

Weststeel.

Seattle, U. S. A., August 11, 1911.

Mr. Beverly Chew,

2d Vice-President,

Metropolitan Trust Co.,

49 Wall Street, New York.

Dear Sir:

Your favor of 1st inst. to hand, advising me of the extension of time on the note of Western Steel to August 28th. I expect between now and that time to complete arrangements that will take up the note in full.

Thanking you for all your courtesy in this matter,
I am, Yours very truly,

JAM:A

J. A. MOORE,

President.

[Indorsed]: Affidavit of Brayton Ives. Filed
January 26, 1912. 2 P. M. John P. Hoyt, Referee.
[51]

[Affidavit of Andrew J. McCormack.]

EXHIBIT "D."

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN BANKRUPTCY—No. —.

In the Matter of WESTERN STEEL CORPORA-
TION,

Bankrupt.

State of New York,
County of New York,
Southern District of New York,—ss.

At the city of New York, Southern District of New York, on the 4th day of November, 1911, came Andrew J. McCormack, of the city, county and State of New York, and made oath and says: I am a member of the firm of Adrian H. Muller & Son, doing business as auctioneers in the city of New York, and having an office at No. 55 William Street, corner of Pine Street, in said city. Prior to the 30th day of August, 1911, the Metropolitan Trust Company of the city of New York, notified my said firm to sell at public auction on Wednesday, the 30th day of August, 1911, Two Million Dollars (\$2,000,000) Western Steel Corporation first mortgage and collateral six per cent gold bonds due October 1, 1930. On the 30th day of August, 1911, I, as auctioneer for my said firm, conducted the sale of the said bonds, and they were then sold at public auction in the Exchange Sales Rooms, 16 to 18 Vesey Street, in the

City of New York, to J. W. Davis & Company at one and a quarter ($1\frac{1}{4}$) per cent, that is, for Twenty-five Thousand Dollars (\$25,000), the same being the best and highest bid made for them, and said J. W. Davis & Company being the highest bidder. [52]

For over sixty years my said firm of Adrian H. Muller & Son have been engaged in business as auctioneers in the sale of stocks and bonds at public auction. In recent years we have conducted the great majority of the public auction sales of stocks and bonds in the city of New York. Every Wednesday, at 12:30 o'clock, we conduct such a public auction sale of stocks and bonds at the aforesaid Exchange Sales Rooms. Our custom is, preliminary to the sale, to send to practically all the important banking and financial corporations, firms and individuals in the financial district of New York City a list of the securities to be sold, and to advertise that list in the "New York Evening Post" of the day before the sale and in the "New York Times" and the "Wall Street Journal" of the day of the sale. These papers are selected because they are considered to be the best media for reaching those who would be likely to bid. The "New York Evening Post" is well known to circulate among people of means and carries a large amount of the highest class of financial advertising. The "New York Times" is the paper designated by rule 27 of the United States District Court in Bankruptcy for the Southern District of New York as the paper for the publication and notice of auction sales. The "Wall Street Journal" circulates very largely in the financial district. Upon

the list for the sale on August 30, 1911, so sent to banking and financial corporations, firms and individuals and so advertised in the "New York Evening Post" on Tuesday, August 29th, and in the "New York Times" and "Wall Street Journal" on Wednesday, August 30th, were the bonds hereinbefore referred to. They formed one of twenty-four lots of different securities advertised for sale and sold on the said 30th day of August, 1911. The Exchange Sales Rooms, the [53] place where the said sale was had, is the place designated by rule 62 of the *General Rules of Practice of the Supreme Court of the State of New York*, adopted pursuant to section 94 of the *Judiciary Law of the State of New York*, the same being chapter 35 of the *Laws of 1909*, and the said section being a re-enactment of a similar provision theretofore contained in Article II of the first title of chapter 1 of the *Code of Civil Procedure of the State of New York*, for the sale of real estate at public auction, said rule providing, among other things, that "where lands in the County of New York * * * are sold under an order, judgment or decree, of any Court, they shall be sold at public auction. * * * Such sales in the County of New York unless otherwise specifically directed, shall take place at the Exchange Sales Rooms now located at 14-16 Vesey Street, in the City of New York. The Appellate Division of the Supreme Court in the First Department is authorized to change the place at which such sales shall be made, may make rules and regulations in relation thereto and may designate the auctioneers or persons who

shall make the same." The said Appellate Division of the Supreme Court in the First Department, which is constituted of the County of New York, in the city of New York, has not changed the place, but the public auction sales of real estate continue to be made there. A certain number of auctioneers are entitled to conduct such sales there, and for many years our firm has been and now is one of the twenty auctioneers authorized to do so, and is the only one of them that does any considerable business in the public auction sales of stocks and bonds. The methods pursued in connection with the aforesaid advertisement and sale of the bonds hereinbefore referred to were those which are customary. They were in all [54] respects regular and the same as those pursued by us in connection with thousands of other lots of securities.

ANDREW J. McCORMACK.

Sworn and subscribed to before me this 4th day of November, 1911.

[Seal]

T. H. MACROBERT,

Notary Public, New York County, No. 260, New York Register, No. 3299.

[Indorsed]: Affidavit of Andrew J. McCormack. Filed Dec. 11, 1911, 2 P. M. John P. Hoyt, Referee.
[55]

[Bond of Western Steel Corporation.]



NP 914

WESTERN STEEL CORPORATION

1000.

FIRST MORTGAGE

AND

COLLATERAL SIX PER CENT

GOLD BOND

INTEREST PAYABLE

April^{1st} and October^{1st}

PRINCIPAL DUE
OCTOBER 1ST A.D. 1930

TRUSTEE'S CERTIFICATE

This is hereby certified that this bond is one of the series of bonds mentioned and described in the Indenture of this referred to.
Lawson Trust Company,
Trustee.

John Lawson
VICE PRESIDENT



Nothing on this bond except by an Officer of the Company

DATE OF REGISTRY

IN WHOSE NAME REGISTERED

TRANSFER AGENT



[Endorsed]: Statement of Agreed Facts. Filed in the United States District Court, Western District of Washington. Oct. 28, 1912. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [58]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

**Order Authorizing Payment of Expenses of
Publication of Notices of Sale.**

The expenses of publication of Notices of Sale in the "Seattle Post Intelligencer" and "Seattle Daily Times" having been authorized and allowed by the Referee are hereby ordered to be paid, as follows:

CHECK NO. 260—The Post Intelligencer
Co.\$254.70

CHECK No. 261—The Times Printing Com-
pany of Seattle..... 226.00

Done in open court this 25th day of April, A. D.
1912.

C. H. HANFORD,
Judge.

Authorized:

JOHN P. HOYT,
Referee.

[Endorsed]: Order Authorizing Payment of Expenses of Publication of Notices of Sale. Filed in

the United States District Court, Western District of Washington. Apr. 25, 1912. A. W. Engle, Clerk. By B. O. Wright. [59]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—Cause No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Order Directing Payment of the Sum of \$7,000 to Metropolitan Trust Company.

It appearing that by the order confirming the sale of the assets of the bankrupt, entered herein on the 20th day of March, A. D. 1912, the purchaser, Metropolitan Trust Company, was required in addition to the purchase price of the said assets to deposit with the trustees herein the additional sum of Seven Thousand Dollars (\$7,000), to be used in the payment of expenses of administration, taxes and prior labor claims, in the event the proceeds of the estate of the bankrupt should prove insufficient for said purpose, and that the trustees herein have in their possession sufficient funds belonging to the estate of the bankrupt wherewith to pay expenses of administration, taxes and prior labor claims without resort to the said sum of Seven Thousand Dollars (\$7,000) deposited by Metropolitan Trust Company as aforesaid, and the repayment of the said sum having been authorized and directed by the Referee,

now therefore, it is

ORDERED that the trustees herein pay to Metropolitan Trust Company the sum of Seven Thousand Dollars (\$7,000) by check drawn as follows:

CHECK No. 346 Bausman & Kelleher, attorneys for
Metropolitan Trust Company.....\$7000.00

The payment of the said amount to be made without prejudice [60] to the rights of the trustees herein, under and by virtue of the said order confirming sale of March 20th, A. D. 1912, to demand and receive from Metropolitan Trust Company the sum of Twelve Thousand Dollars (\$12,000), or so much thereof as subsequent developments in the administration of the estate of the bankrupt may prove to be necessary to pay expenses of administration, taxes and prior labor claims, in the event of the proceeds of the estate of the bankrupt shall prove insufficient for that purpose.

Done in open court this 20th day of September,
A. D. 1912.

EDWARD E. CUSHMAN,
Judge.

Authorized:

JOHN P. HOYT,
Referee.

[Endorsed]: Order Directing Payment of the sum of \$7,000 to Metropolitan Trust Company. Filed in the United States District Court, Western District of Washington. Sep. 20, 1912. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [61]

[Memorandum Decision.]

*United States District Court, Western District of
Washington, Northern Division.*

No. 4746.

In the Matter of THE WESTERN STEEL COR-
PORATION,

Bankrupts.

MUNN & BRACKETT, for Trustee.

BAUSMAN & KELLEHER, for Claimant.

Filed Feb. 8, 1913.

By the COURT:

In the month of January, 1911, the Western Steel Corporation borrowed the sum of \$300,000 from the Metropolitan Trust Company of the City of New York and pledged \$1,800,000 par value of a total issue of \$2,000,000 of mortgage bonds as security for the payment of the loan at maturity.

On the first day of April, 1911, the Steel Corporation borrowed an additional \$300,000 from the Trust Company and executed its promissory note in favor of the Trust Company for the sum of \$600,000, payable on August 1, 1911. The entire issue of \$2,000,000 of mortgage bonds was pledged to secure the payment of this loan and the note was signed by James A. Moore, president and principal stockholder of the Steel Corporation as guarantor. The note contained the following provisions, among others:

“The said company is hereby authorized, upon the nonpayment of any of the liabilities above

mentioned when due, to sell, assign and deliver the whole of said securities, [62] or any part thereof, or any substitutes therefor, or any additions thereto, or any other securities or property given unto, or left in the possession or custody of the said company by or for the undersigned, at any Broker's Board or at public or private sale, at the option of said company, without either advertisement or notice, which are hereby expressly waived.

If such securities or property are sold at public sale, the said company may itself purchase the whole or any part thereof, free from any right of redemption on the part of the undersigned which is hereby waived and released."

The loan was not paid at maturity and on the date of maturity the Trust Company notified the Steel Corporation by letter that if the note was not paid on or before Monday, August 28, 1911, the securities would be sold at public auction in the city of New York on the 30th day of August, 1911. Receipt of this note was acknowledged by the Steel Corporation under date of August 11, 1911. No part of the note was paid on or before the date mentioned, or at all, and on the 29th day of August, 1911, the bonds were advertised for sale in the "New York Evening Post," and on the morning of August 30th in the "New York Times" and "Wall Street Journal," and notices of sale were likewise mailed to the principal bond buyers, banking and financial corporations and firms, and individuals in the financial district of the city of New York. The

newspapers in which the sale was thus advertised are generally considered the best media for reaching bidders and buyers in the city of New York, one of them being the paper designated by the United States District Court in Bankruptcy for the Southern District of New York for the publication of notices of auction sales. The places of sale was the place designated by the general rules of the Supreme Court of the State of New York for public auction sales, and is the usual and proper place for [63] conducting such sales. The bonds were sold at a regular auction sale held weekly at that time and place for the sale of stocks, bonds and financial securities, and was largely attended by buyers of financial securities. The proceedings for the sale of these securities, the notice given, and the manner in which the sale was advertised and conducted were such as are customary, regular and usual in the sale of listed or known stocks, bonds and financial securities marketable in the city of New York. The bonds were bid in by the Trust Company for the sum of \$25,000, it being the highest and best bidder, and no attack on the sale was ever made by the Steel Corporation, and no question as to the validity of the sale was ever raised, until after bankruptcy proceedings were instituted against the corporation.

On the 26th day of October, 1911, the Steel Corporation was adjudged a bankrupt in this court and the Trust Company presented its claim for the \$2,000,000 bond issue, less the amounts received thereon, as a general creditor of the bankrupt corporation. The trustee and referee allowed the claim for the amounts

actually advanced by the Metropolitan Trust Company with interest, but rejected the balance of the claim on the ground that the Trust Company acquired no title to the bonds by reason of the sale above mentioned. The case is now here on a petition of the Trust Company for a review of the order and decision of the referee rejecting its claim.

The referee in bankruptcy rejected the claim based on the bond sale for two reasons—first, because the sale could not be upheld as a private sale, inasmuch as the pledgee became the purchaser, and, second, because it could not be upheld as a public sale, on account of the inadequacy of price and the want of sufficient notice of the time and place of sale. [64]

The Court finds itself unable to agree with this latter conclusion. The trustee in bankruptcy has only succeeded to the rights of the bankrupt, and can only urge such objections as were open to it prior to the adjudication. The contract under which the bonds were sold was made in New York and was subject to the laws of that State. It is admitted by the parties that the sale was conducted in the usual and customary manner and in full accordance with the laws of that State. To overturn such a sale for want of a notice neither sanctioned or required by law or usage would overturn many of the most important transactions of the business world. The fact that the notice was not sufficient in time to give prospective bidders time and opportunity to examine and inspect the properties behind the bonds, cannot change the rule. To allow sufficient time for that purpose would postpone the sale perhaps for months

and the expense attending such examination and inspection would be so great that no mere bidder at a public sale could afford to undertake the task. Furthermore, no such construction of the contract could have been contemplated by the original parties thereto. They were both presumably familiar with the laws and customs of the city of New York, and fully understood and contemplated that the bonds would be sold, just as they were afterwards sold, in case default was made in the payment of the loan.

Nor can the sale be set aside for mere inadequacy of consideration. Many authorities hold that mere inadequacy of price is not sufficient to justify the setting aside of a public sale in any case, and all the authorities agree that before a sale can be set aside on that ground alone, the inadequacy must [65] be so great as to shock the conscience and raise a presumption of fraud. The schedule and the report of the appraisers show that the properties owned by the bankrupt corporation are widely scattered, encumbered and largely unpaid for. Their value is uncertain and highly problematic at best. Suffice it to say on this branch of the case that no such inadequacy of price is shown as would shock the conscience or raise a presumption of fraud where it is conceded that no fraud was practiced or existed. The following cases fully support the conclusion of the Court:

Atlantic Trust Co. v. Woodbridge, 79 Fed. 844;

Same v. Same, 86 Fed. 975;

Morris v. East Side Ry. Co., 104 Fed. 109;

In re Mertens, 144 Fed. 822;

Farmer's Loan & Trust Co. v. Toledo, 54 Fed. 759;

Wheelright v. St. Louis M. O. & O. C. T. Co., 56 Fed. 164;

Fidelity Ins. Co. v. Roanoke Iron Co., 81 Fed. 439;

24 Cyc. 39 and cases cited.

The order of the referee is reversed, with instructions to allow the claim as presented.

[Endorsed]: Memorandum Decision. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. E. M. L., Deputy. [66]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

Order Reversing Order of Referee upon Objections to Claim of Metropolitan Trust Company of the City of New York, and Allowing Such Claim.

This matter having, on the petition of Metropolitan Trust Company of the City of New York for the review of the order of the referee entered herein on the 1st day of April, 1912, come on to be heard before this court the 6th day of January, 1913, upon the record submitted and the statement of agreed facts filed by the parties herein, with the exhibits, papers

and evidence attached thereto and referred to therein; and the order of the referee on the trustees' objections to the claims of Metropolitan Trust Company, the certificate and return of the referee upon the petition for review, the petition of Metropolitan Trust Company for the review of the order of the referee upon the objection to the claims of Metropolitan Trust Company, statement of agreed facts, with exhibits, order authorizing payment of expenses of publication of notice of sale filed April 25, 1912, order directing payment of Seven Thousand Dollars (\$7,000.00) to the Metropolitan Trust Company filed September 20, 1912; and the several bids received by the trustees in bankruptcy for the assets offered by them for sale, having been received in evidence, and no other evidence [67] being offered by either party, and the cause having been argued by counsel for the respective parties, and submitted to the Court for its decision, and the Court having considered the same, and being advised in the premises, and having made findings as stated in the Court's opinion filed herein, it is now

ORDERED, ADJUDGED AND DECREED BY THE COURT that the order of the Referee herein be and the same is hereby reversed in so far as it rejects and disallows the claims of Metropolitan Trust Company of the city of New York upon the bonds and note of Western Steel Corporation, and directs that said note be cancelled; and the proofs of claim of the Metropolitan Trust Company are hereby allowed in the sum of One Million Four Hundred Seventy-two Thousand Nine Hundred Ninety Dol-

lars (\$1,472,990.00), upon the bonds of Western Steel Corporation after deducting the sum in which said bonds have been used in paying for the properties of the bankrupt purchased under the decree of this court, and in the sum of Five Hundred Eighty-two Thousand Four Hundred Fifty-seven Dollars (\$582,457.00) upon the promissory note of the bankrupt attached to said Trust Company's proof of claim herein; and it is ordered that there be credited and indorsed by said trustees upon said note the amount of such dividends as may be paid upon the claim of Metropolitan Trust Company thereon.

Done in open court this 27th day of February, 1913.

CLINTON W. HOWARD,
District Judge.

O. K. as to form.

MUNN & BRACKETT.

[Endorsed]: Order Reversing Order of Referee upon Objections to Claim of Metropolitan Trust Company, and Allowing Such Claim. Filed in the United States District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. B. O. Wright, Deputy. [68]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

Cause No. 4746.

In the Matter of WESTERN STEEL CORPORATION,
TION,

Bankrupt.

**Assignment of Errors in the Entry of the Order of
February 27th, 1913, Re Claims of Metropolitan
Trust Company.**

Come now Lester Turner, Sutcliffe Baxter and Edgar Ames, trustees in bankruptcy of the Western Steel Corporation, on this 27th day of February, A. D. 1913, by their attorneys, Munn & Brackett, and say that the order of the District Court entered in the above cause on the 27th day of February, A. D. 1913, reversing the order of the Referee of April 1st, 1912, and directing the allowance of the claims of the Metropolitan Trust Company as filed, is erroneous and unjust in the following particulars to wit:

FIRST: Your trustees assign as error the entry of the order of February 27th, 1913, reversing the order of the Referee with instructions to allow the claims as presented.

SECOND: Your trustees assign as error the finding of fact set out in the opinion of the Court that the procedure adopted by Metropolitan Trust Company in the attempted foreclosure of the pledged securities, was legally sufficient to transfer the title of the said securities to Metropolitan Trust Company.

THIRD: Your trustees assign as error the finding of the Court in its said opinion that the sale of the said securities took place in accordance with the terms of the contract of pledge.

FOURTH: Your trustees assign as error the finding of the Court in its said opinion that the sale of the securities by Metropolitan Trust Company was conducted in the usual and customary manner and

in full accordance with the laws of the State of New York where the contract was made.

FIFTH: Your trustees assign as error the finding of the Court [69] in its said opinion that the parties to the notes upon which the said bonds were pledged as collateral, fully understood and contemplated that in case of default in payment of the loan the bonds would be sold just as they were afterwards sold.

SIXTH: Your trustees assign as error the finding of the Court in its said opinion that the inadequacy of the price upon the sale of the said securities was not such as to shock the conscience of the Court or raise the presumption of fraud.

SEVENTH: Your trustees assign as error the finding of the Court in its said opinion that the method of advertising the sale of the securities upon foreclosure of the pledge was sufficient to sustain the sale as a valid public sale.

EIGHTH: Your trustees assign as error the failure of the Court to find that the bonds of the bankrupt were unlisted securities having no known or market value in the commercial world.

NINTH: Your trustees assign as error the failure of the Court to distinguish between standard, known or listed securities and securities neither listed nor having a known or market value in the commercial world and its failure to find that the bonds of the bankrupt being unlisted securities and having no known or market value, could not be sold at public sale on foreclosure of the pledge except after the same had been advertised for such period of time

prior to the sale as would enable prospective bidders to investigate the value of the said bonds.

TENTH: Your trustees assign as error that the Court erred in assuming that the procedure adopted by Metropolitan Trust Company in the attempted foreclosure of the pledge, which procedure was admitted to be such as was customary in New York City in the sale on foreclosure of listed, standard or marketable securities, was legally sufficient to affect a valid public sale and transfer of title to the bonds of the bankrupt which were unlisted securities [70] having no known or market value in the commercial world.

ELEVENTH: Your trustees assign as error the finding of the Court in its opinion that the Metropolitan Trust Company could itself become a purchaser of the bonds of the bankrupt at the sale conducted by it for the inadequate sum of Twenty-five Thousand (\$25,000.00) Dollars, and particularly at an alleged public sale of which possible bidders had less than twenty-four hours' notice.

TWELFTH: Your trustees assign as error the failure of the Court to find that the action of Metropolitan Trust Company in selling the bonds of the bankrupt to itself for the sum of Twenty-five Thousand (\$25,000.00) Dollars at an attempted public sale held upon less than twenty-four hours' notice to the public was a wanton sacrifice of the securities and in fraud of the bankrupt.

WHEREFORE your trustees pray that said order of February 27th, 1913, be reversed.

MUNN & BRACKETT,
Attorneys for Trustees.

[Endorsed]: Assignment of Errors in the Entry of the Order of February 27th. Re Claim of Metropolitan Trust Company. Filed in the United States District Court, Western District of Washington. Feb. 27, 1913. Frank D. Crosby, Clerk. By B. O. Wright, Deputy. [71]

[Petition for, and Order Allowing, Appeal.]

In the District Court of the United States for the Western District of Washington, Northern Division.

Cause No. 4746.

In the Matter of WESTERN STEEL CORPORATION,

Bankrupt.

PETITION FOR APPEAL FILED FEBRUARY 27, A. D. 1913, IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

To the Honorable CLINTON W. HOWARD, District Judge.

The trustees in bankruptcy of the Western Steel Corporation feeling themselves aggrieved by the order made and entered in this cause on the 27 day of February, A. D. 1913, by which said order the order of the Referee herein disallowing the claim of the Metropolitan Trust Company was reversed with instructions to allow the claim as presented, hereby appeal from said order to the United States Circuit Court of Appeals of the Ninth Circuit, for the rea-

sons specified in the Assignment of Errors which is filed herewith, and pray that their appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

MUNN & BRACKETT,

Attorneys for Trustees in Bankruptcy.

The foregoing petition is granted and the appeal allowed.

CLINTON W. HOWARD,

Judge of the District Court of the United States for the Western District of Washington, Northern Division.

[Endorsed]: Petition for Appeal. Filed in the United States District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [72]

Citation on Appeal [Copy].

United States of America to Metropolitan Trust Company of the City of New York, a Corporation, and Messrs. Bausman & Kelleher, Its Attorneys, Greeting:

You are hereby notified that in a certain case in bankruptcy in the United States District Court for the Western District of Washington, Northern Division, entitled "In the Matter of Western Steel Corporation, a Corporation, Bankrupt," cause No. 4746, an appeal has been allowed to the trustees in bank-

ruptcy therein, to the Circuit Court of Appeals of the United States of America, Ninth Circuit, from the order of the District Court entered on the 27th of February, A. D. 1913, reviewing and reversing the Referee's order of April 1st, 1912, and directing allowance of the claims of the Metropolitan Trust Company based upon its alleged ownership of Two Million (\$2,000,000) Dollars First Mortgage Bonds of the Bankrupt and upon the promissory note of the Bankrupt. You are hereby cited and admonished to be and appear in said Court at San Francisco, California, 30 days after date of this citation, to show cause, if any there be, why the said order appealed from should not be corrected and speedy justice done the parties in that behalf.

Witnesses the Honorable CLINTON W. HOWARD, Judge of the United States District Court for the Western District of Washington, Northern Division, this 27 day of February, A. D. 1913.

CLINTON W. HOWARD,
United States District Judge.

Service of the within citation and receipt of a true copy of the same is hereby acknowledged the 27th day of February, 1913.

BAUSMAN & KELLEHER,
Attorneys for Metropolitan Trust Co.

[Endorsed]: Citation on Appeal. Filed in the United States District Court, Western District of Washington. Feb. 28th, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy. [73]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 4746.

In the Matter of WESTERN STEEL CORPORA-
TION,

Bankrupt.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 77 typewritten pages, numbered from 1 to 77, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as is called for by the praecipe of the attorneys for the trustees and appellants, as the same remain of record and on file in the office of the Clerk of the said Court, with the exception of the copy of the Gold Bond in which the numbers differ, and that the same constitute the transcript of record on appeal from the order of the District Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing and

certifying the foregoing transcript is the sum of \$37.90, and that the said sum has been paid to me by Messrs. Munn and Brackett, attorneys for trustees and appellants. [74]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 15 day of March, A. D. 1913.

[Seal]

FRANK L. CROSBY,
Clerk. [75]

Citation on Appeal [Original].

United States of America to Metropolitan Trust Company of the City of New York, a Corporation, and Messrs. Bausman & Kelleher, Its Attorneys, Greeting:

You are hereby notified that in a certain case in bankruptcy in the United States District Court for the Western District of Washington, Northern Division, entitled "In the Matter of Western Steel Corporation, a Corporation, Bankrupt," cause No. 4746, an appeal has been allowed to the trustees in bankruptcy therein, to the Circuit Court of Appeals of the United States of America, Ninth Circuit, from the order of the District Court entered on the 27th of February, A. D. 1913, reviewing and reversing the Referee's order of April 1st, 1912, and directing allowance of the claims of the Metropolitan Trust Company based upon its alleged ownership of Two Million (\$2,000,000) Dollars First Mortgage Bonds of the bankrupt and upon the promissory note of the bankrupt. You are hereby cited and admonished to

be and appear in said court at San Francisco, California, 30 days after date of this citation, to show cause, if any there be, why the said order appealed from should not be corrected and speedy justice done the parties in that behalf.

Witnesses the Honorable CLINTON W. HOWARD, Judge of the United States District Court for the Western District of Washington, Northern Division, this 27 day of February, A. D. 1913.

CLINTON W. HOWARD,
United States District Judge. [76]

Service of the within citation and receipt of a true copy of the same is hereby acknowledged the 27th of February, 1913.

BAUSMAN & KELLEHER,
Attorneys for Metropolitan Trust Co.

[Endorsed]: No. 4746. In the District Court of the United States for the Western District of Washington, Northern Division. In Bankruptcy. Citation on Appeal. Filed in the United States District Court, Western District of Washington. Feb. 28, 1913. Frank L. Crosby, Clerk. By B. O. Wright, Deputy.

[Endorsed]: No. 2257. United States Circuit Court of Appeals for the Ninth Circuit. Lester Turner, Sutcliffe Baxter and Edgar Ames, as Trustees of Western Steel Corporation, Bankrupt, Appellants, vs. Metropolitan Trust Company of the City of New York, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Received March 20, 1913.

F. D. MONCKTON,
Clerk.

Filed March 24, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESTER TURNER, SUTCLIFFE
BAXTER and EDGAR AMES,
as Trustees in Bankruptcy of
Western Steel Corporation, Bank-
rupt,

Appellants,

vs.

METROPOLITAN TRUST COM-
PANY, of the City of New York, a
corporation,

Appellee.

No. 2257

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

APPELLANTS' BRIEF

ABSTRACT OF FACTS.

The facts involved in this appeal are as follows:
On August 1, 1911, Metropolitan Trust Company

was the holder of the note of the Bankrupt in the sum of Six Hundred Thousand (\$600,000) Dollars then due. The note was secured by the pledge of the entire issue of Two Million (\$2,000,000) Dollars, first mortgage bonds of the Bankrupt. (Transcript, page 18.) The pledge agreement (Transcript, page 50) authorized the pledgee upon default in the payment of the note, to sell the collateral at public or private sale without either advertisement or notice, which were by the terms of the pledge expressly waived. At any public sale of the collateral the pledgee was by the terms of the pledge agreement, entitled to become a purchaser. The bonds of the Bankrupt were not standard or listed securities and concerning their value or the properties covered by the trust deed securing the bonds, no definite information was possessed by the commercial world (Transcript, page 20, paragraph 6). All that can be said of their actual worth is disclosed in paragraphs ten (10), eleven (11) and twelve (12) of the Agreed Statement of Facts (See Transcript, pages 22 to 25) and the Reports of the Appraisers (Transcript, pages 29 to 43). A summary of the facts regarding the value of the bonds and the properties covered by them, set out in the Agreed Statement of Facts and in the Appraisers' Report, may be stated as follows:

The mortgage trust deed covered all the properties of the Bankrupt save personal property other than stock in the subsidiary corporation in which

title to the Graham Island properties was vested. Eliminating from the appraisers report of January, 10, 1912 (Transcript, page 35) all of the items of personal property except the corporate stock above mentioned, it appears that the quick sale for cash value of the assets covered by the mortgage was Three Hundred Sixty-six Thousand Thirty-five (\$366,035) Dollars. As a going concern, the appraisers estimated that the steel plant which they had appraised at Ninety-nine Thousand Thirty-five (\$99,035) Dollars would be worth at least Three Hundred Ninety-nine Thousand Nine Hundred Forty-two (\$399,942) Dollars (Transcript, page 37) and if the plant was a going concern or a sufficient time was had for promotion and negotiation even without the plant a going concern, much higher prices could be secured for much of the outlying property (Transcript, page 43.) Thus it appears that the minimum value of the assets covered by the mortgage trust deed appraised after bankruptcy, when the project was discredited among buyers was Three Hundred Sixty-six Thousand Thirty-five (\$366,035) Dollars and, even at that date was worth to one who could properly finance it a total minimum of Six Hundred Sixty-six Thousand Nine Hundred (\$666,900) Dollars.

The pledgee gave due notice to the pledgor of intent to sell at public auction (Transcript, pages 18 and 19). An auction sale was conducted in

New York City at a proper place by reputable auctioneers and the proceedings taken as to advertisement, notice of sale and sale at auction were such as were customary, regular and usual in the sale of listed or known bonds or securities marketable in the City of New York (Transcript, page 20, paragraph 7). The bonds of the Bankrupt were not listed or marketable securities and their value or the properties covered by them was not known to the commercial world (Transcript, page 20, paragraph 6). The advertisement or notice to the public that the bonds would be sold at auction consisted of a notice published in the New York Evening Post, of the evening of August 29th, and in the New York Times and Wall Street Journal of the morning of November 30th. Notices of the sale of the bonds were also mailed to the principal bond buyers, banking and financial corporations, firms and individuals in the financial district of New York City. The sale took place at twelve o'clock, M., on August 30th, (Transcript, page 19, paragraph 5). The bonds were bid in by the pledgee for the sum of Twenty-five Thousand (\$25,000) Dollars, which amount, less cost of sale was credited in reduction of the Six Hundred Thousand (\$600,000) Dollar note. Upon the bankruptcy of Western Steel Corporation, the appellee filed as an unsecured creditor, its claim in the sum of approximately Five Hundred Seventy-five Thousand (\$575,000) Dollars, (Transcript, page 21, paragraph 8, also page 44),

asserting itself also to be the absolute owner of the Two Million (\$2,000,000) Dollars of bonds of the Bankrupt. Upon sale of the assets of the Bankrupt, the Appellee urged its right to bid the entire Two Million (\$2,000,000) Dollars face value of the bonds as the purchase price of the properties covered by the mortgage trust deed (Transcript, page 26, paragraph 13). The Trustees of the Bankrupt disputed the right of the Appellee to use the said bonds in bidding in any amount in excess of Six Hundred Thousand (\$600,000) Dollars, the amount originally advanced by the appellee. The Order of Sale entered by the Referee limited the use of the said bonds in bidding to the sum of Six Hundred and Fifty Thousand (\$650,000) Dollars without prejudice to the rights of appellee to later file its claim as legal owner of the said bonds to their full face value (Transcript, page 26). Upon sale of the assets of the Bankrupt, appellee purchased the property covered by the Mortgage Trust Deed for the sum of Six Hundred Forty-Seven Thousand (\$647,000) Dollars, and was allowed to make payment of the same by the use of its bonds to that amount (Transcript, page 27). Thereafter the Trustees filed their petition asking for the cancellation of the original Six Hundred Thousand (\$600,000) Dollar note of the Bankrupt and of the entire issue of bonds upon the ground that the proceedings taken by the appellee in the attempted foreclosure of its pledge were legally insufficient to vest the legal title to the

collateral in it free from its obligation to hold the same as pledgee and that the appellee, by the use of the bonds in the purchase of the Bankrupt's assets, had received payment upon the note in an amount equal to its original loan. Upon hearing before the Referee the Order of April 1, 1912, (Transcript, page 8) was entered directing the cancellation of the said Six Hundred Thousand (\$600,000) Dollar note and the bonds. Upon petition for review to the District Court the Order of the Referee was upon February 27, 1913, reversed with instructions to allow the claims as filed (See Memorandum Decision, Transcript, page 64, Order, Transcript, page 69).

From the Order of the District Court of February 27, 1913, reversing the Referee's order and directing the allowance of the claims as filed, this appeal is taken.

SPECIFICATION OF ERRORS.

I.

The court erred in the entry of the Order of February 27, 1913, reversing the Order of the Referee with instructions to allow the claims as presented (Assignment of Errors, Transcript, page 72).

II.

The court erred in the finding of fact set out in the opinion of the court that the procedure adopted by Metropolitan Trust Company in the attempted foreclosure of the pledged securities, was legally

sufficient to transfer the title of the said securities to Metropolitan Trust Company (Assignment of Errors, Transcript, page 72).

III.

The court erred in the finding of fact set out in its opinion that the sale of the said securities took place in accordance with the terms of contract of pledge. (Assignment of Errors, Transcript, page 72.)

IV.

The court erred in the finding of fact set out in its said opinion that the sale of the securities by Metropolitan Trust Company was conducted in the usual and customary manner and in full accordance with the laws of the State of New York where the contract was made. (Assignment of Errors, Transcript, page 72.)

V.

The court erred in the finding of fact set out in its said opinion that the parties to the notes upon which the said bonds were pledged as collateral, fully understood and contemplated that in case of default in payment of the loan, the bonds would be sold just as they were afterwards sold. (Assignment of Errors, Transcript, page 73.)

VI.

The court erred in its findings set out in its said opinion that the inadequacy of price upon the sale

of the said securities was not such as to shock the conscience of the court or raise the presumption of fraud. (Assignment of Errors, Transcript, page 73.)

VII.

The court erred in its findings of fact set out in its said opinion that the method of advertising the sale of the securities upon foreclosure of the pledge was sufficient to sustain the sale as a valid public sale. (Assignment of Errors, Transcript, page 73.)

VIII.

The court erred in not finding as a fact that the bonds of the bankrupt were unlisted securities having no known or market value in the commercial world. (Assignment of Errors, Transcript, page 73.)

IX.

The court erred in not distinguishing between standard, known or listed securities and securities neither listed nor having a known or market value in the commercial world and in not finding as a fact that the bonds of the bankrupt being unlisted securities and having no known or market value could not be sold at public sale on foreclosure of the pledge except after the same had been advertised for such a period of time prior to the sale as would enable prospective bidders to investigate the value of the said bonds. (Assignment of Errors, Transcript, page 73.)

X.

The court erred in assuming that the procedure adopted by Metropolitan Trust Company in the attempted foreclosure of the pledge which procedure was admitted to be such as was customary in New York City in the sale on foreclosure of listed, standard or marketable securities, was legally sufficient to affect a valid public sale and transfer of title to the bonds of the bankrupt, which were unlisted securities having no known or market value in the commercial world. (Assignment of Errors, Transcript, page 74.)

XI.

The court erred in the finding of fact in its said opinion that Metropolitan Trust Company could become a purchaser of the bonds of the bankrupt at the sale conducted by it for the inadequate sum of Twenty-five Thousand (\$25,000) Dollars and particularly at an alleged public sale of which possible bidders had less than twenty-four hours notice. (Assignment of Errors, Transcript, page 74.)

XII.

The court erred in not finding that the action of Metropolitan Trust Company in selling the bonds of the Bankrupt to itself for the sum of Twenty-five Thousand (\$25,000) Dollars at an attempted public sale held upon less than twenty-four hours notice to the public, was a wanton sacrifice of the securities

and in fraud of the bankrupt. (Assignment of Errors, Transcript, page 74.)

ARGUMENT.

The duties and obligations imposed upon a pledgee by the common law, require that when he proceeds in the enforcement of the pledge agreement by sale of the collateral he must give reasonable notice to the pledgor specifying the time and place of sale in order that the pledgor may redeem, prior to the sale, or at least be present to see that the sale is fairly conducted.

31 *Cyc.* 873, paragraphs 3 and 4

The sale must be a public auction after due advertisement.

Idem. 878, paragraph B.

The pledgor may not purchase at his own sale.

Idem. 879, paragraph B.

These limitations which the common law has imposed upon the pledgee as safeguards against fraud and unfair treatment of the pledgor, may be modified and to some extent waived by the express agreement of the pledgor. Thus, it is settled, that the provision in the contract of pledge, that the pledgee may sell the collateral without notice to the pledgor is valid and binding. So also if the pledge agreement provides that the collateral may be sold at private rather than public sale, the stipulation is

valid. A provision that the pledgee may become the purchaser at a public sale if the sale is conducted in strict good faith and in accordance with the terms of the contract, is valid.

Good faith, that is, a fair and honest effort to sell the collateral for the highest price it will bring, in order thereby to wipe out or so far as possible reduce the pledge indebtedness is required of the pledgee by common law under the usual pledge agreement wherein the pledgor has waived none of the common law safeguards. The reason for the rule is that the pledgee in the enforcement of the pledge is acting in part as Trustee for the pledgor and is charged with a Trustee's obligation to protect the interests of the pledgor.

31 *Cyc.* 877, paragraph 6.

In the case at bar the pledgee was not merely Trustee for the pledgor in the usual sense and under the usual form of pledge, but was Trustee for a pledgor which had placed itself entirely in the power of the pledgee by the waiver of all of the common law safeguards, for the pledgee in this case had power to sell without notice or advertisement at public or private sale and at the public sale was authorized to become the purchaser. Moreover, in this case the collateral was the obligation of the pledgor itself. The pledge agreement was not the usual one where personal property or securities which are the obligations of third parties are pledged as collateral.

If the procedure taken by the pledgee in this case is upheld as legal and sufficient to vest in the pledgee legal title to the bonds discharged of the pledge obligation then without the bonds ever having left the possession of the pledgee and without any new consideration, by the fiction of a public sale held on less than twenty-four hours advertisement to the public, the pledgee will have increased the obligation which it holds against the pledgor from Six Hundred Thousand (\$600,000) Dollars to Two Million Five Hundred Seventy-five Thousand (\$2,575,000) Dollars.

An agreement by the borrower of Six Hundred Thousand (\$600,000) Dollars by the terms of which, upon his failure to pay at maturity, the amount of his obligation should forthwith be increased to Two Million Five Hundred and Seventy-five Thousand (\$2,575,000) Dollars, would not be upheld by any court as valid, especially where the borrower has become insolvent and the rights of other creditors are involved. We believe the procedure adopted by the pledgee in this case was as certain to reach that result as though the contract had specifically provided for the forfeiture and that as a means of cutting off the pledgor's equity in the collateral, the one method was as invalid as the other would have been.

**WHERE THE PLEDGED COLLATERAL CONSISTS OF
AN OBLIGATION OF THE PLEDGOR IN A GREATER**

AMOUNT AND THE COLLATERAL IS PURCHASED BY THE PLEDGEE, HE SHOULD NOT BE ALLOWED TO ENFORCE IT AGAINST THE PLEDGOR IN AN AMOUNT GREATER THAN THE ORIGINAL PLEDGE OBLIGATION.

The grave injustice of allowing a pledgee to purchase the obligations of the pledgor at a sale conducted by him in the foreclosure of the pledge and to enforce the obligations so purchased to their full face value, has led some courts to hold that the pledgee can in no event collect more than the amount of his original loan. In these cases, moreover, no question is raised as to the regularity of the steps taken by the pledgee in conducting the sale.

Peacock vs. Phillips, 93 N. E. 415, Ill., 1910;
*Knickerbocker Trust Company vs. Penacook
Manufacturing Company*, Circuit Court,
N. H. 1900, 100 Federal 814.

In the Illinois case above cited, the note of the pledgor secured by mortgage in the sum of Four Thousand (\$4,000) Dollars was pledged as collateral security for a loan of Twenty-five Hundred (\$2,500) Dollars. Upon default the pledgee sold the collateral to the defendant Phillips, who, however, purchased with notice of the terms of the pledge. The opinion by Cartwright, J. uses this language:

“In this case there was a contract authorizing the bank to sell the Four Thousand (\$4,000) Dollar note and trust deed at public or private sale, without advertising the same, or demanding payment, or giving notice, and with the right of the bank to

purchase at the sale, if made at any broker's board or any public sale. The bank, therefore, might have foreclosed the trust deed pledged for the payment of its note of Twenty-five Hundred (\$2,500) Dollars, and could not have had a decree for any more than the amount due on such note, or it could elect to sell the collateral in accordance with the power given by the contract. In case of foreclosure, the equities between the parties would have forbidden an enforcement of the lien for more than the debt to the bank; and the question is whether that result could be accomplished by selling the note and trust deed, in pursuance of the agreement to one who had notice of the facts."

The opinion then reasons that a mortgage is not assignable and that a purchaser of the mortgage takes with notice of equities in favor of the mortgagor; that the purchaser here is in the same position as the pledgee would have been, had he purchased the note and mortgage. Continuing the opinion states:

"We do not see any good reason for saying that a mere grant of power to sell enabled the bank to confer a greater right upon the purchaser with full notice of the facts and circumstances and the extent to which the bank could enforce the obligation, than the bank would have had in case of foreclosure."

The exception noted at the end of the court's opinion in favor of corporate bonds, is an exception to the doctrine announced by the court that the purchaser of a mortgage takes it with constructive notice of equities in favor of the mortgagor. It is not intended as stating an exception to the prin-

ciple announced in the case that as between pledgor and pledgee or one purchasing with notice, the equities in favor of the pledgor prevent the enforcement of the collateral to an amount beyond the principal obligation. The cases cited as supporting the exception in favor of corporate bonds merely hold that a bond being payable to bearer is a negotiable instrument and that a holder is not charged with notice of equities in favor of the obligor.

In *Knickerbocker Trust vs. Penacook*, the pledgee acting in good faith and in conformity with the contract of pledge, sold the bonds at public auction and purchased the same as highest bidder. Held that he could enforce the same to the extent only of the original obligation. The court uses this language:

“The holding (of the bonds) originally being as collateral security, is now by virtue of the sale. The sale was sufficiently within what was contemplated by the mortgage contract arrangement to be treated as valid for purposes of maintaining this suit; but the mortgagee who was the Trustee and who now holds the bonds under the sale took them with full notice of all the equities and has no standing beyond the amount represented by the actual indebtedness. Holding it as collateral security and having taken the required steps to that end, the trustee may foreclose the mortgage for the purpose of perfecting and realizing upon his security, but the security cannot extend beyond the actual indebtedness. There will be judgment of foreclosure for the plaintiff, which foreclosure is for

the benefit of the actual indebtedness from the mortgagor to the mortgagee, and for the benefit of the intervening bond holders as well."

Contrary to the above doctrine see

Atlantic Trust Company vs. Woodbridge Canal and Irrigation Company, Circuit Court, N. D. Cal., 1897, 86 Federal 975 at 982.

Where the court, Morrow, J., uses this language:

"These bonds had been pledged to the interveners as security for certain materials furnished to the defendant corporation. I held that the interveners were entitled to be paid the amount pledged on the bonds. It is now claimed, however, that with respect to the bonds held by Buell and Company, one of the Interveners, the full face value of the bonds should be allowed to them as they were sold at public auction in accordance with the terms of the bonds and were bought in by Buell and Company. Without entering into a discussion of the question, it may be said that Buell and Company, having bought in the bonds held by them as pledge security, are entitled under the decision in *Wade vs. Railroad Co.*, 149 U. S., 327, to the full face value of the bonds. See also *Farmers' Loan and Trust vs. Toledo*, 54 Federal 759; *Wheelwright vs. U. S. Transportation Co.*, 56 Federal 164."

An examination of the cases cited as supporting the doctrine announced without discussion in the above case, shows that the authorities cited do not support the holding. In *Wade vs. Railway Co.*, 149 U. S. 327, the bonds were neither obligations of the pledgor nor were they purchased by the pledgee.

In *Farmers' Loan and Trust vs. Toledo* it is held

that the sale of Two Hundred and Ten (210) One Thousand (\$1,000) Dollar bonds for the sum of Twenty Thousand (\$20,000) Dollars and purchased by the pledgee pursuant to the terms of the pledge, was not void but at most voidable and that in any event the question could not be raised by the interveners, no complaint, on account of the sale having been made by the pledgor. The question upon which the case is cited is authority, was therefore, not properly before the court and was not passed upon. (See page 774.)

Atlantic Trust Co. vs. Woodbridge also relies upon

Wheelwright vs. St. Louis Transportation Co., Circuit Court E. D. La., 1893, 56 Federal 164.

From the facts stated in this case it is uncertain whether the obligations held as collateral under the pledge were the bonds of the pledgor, but it does appear that the bonds were not purchased by the pledgee (See page 165). It is stated that the pledge was made to the First National Bank of New York, which appears not to have been a party to the suit. The only discussion in the court's opinion regarding the enforceability of the bonds to their full extent is as follows:

“As to the foreclosure of the pledge, it seems to have been foreclosed in a manner strictly legal. The fact that at the sale the bonds brought but little, there being no fraud shown can not impeach the

complaint's title. I think therefore, his title to the Two Hundred and Sixty-five (265) bonds which he bought at this sale was complete."

From the three cases last cited it appears that the judgment of the court in the case of *Atlantic Trust Company vs. Woodbridge*, respecting the enforceability of the obligation of the pledgor purchased by the pledgee, is not sustained by the authorities cited and is not supported by discussion of principles involved. It is believed that the weight of authority and better reason is in favor of the rule contended for by appellants, that a pledgee who purchases the collateral obligation of the pledgor and seeks to enforce the same, should be limited in his recovery to the amount originally loaned. The appellees in this case have received value to that amount, for they were allowed by the Referee, to use the bonds held by them to the extent of Six Hundred and Fifty Thousand (\$650,000) Dollars in the purchase of the properties covered by the bond issue.

THE PLEDGEE'S INTENT IN CALLING A SALE ON LESS THAN TWENTY-FOUR HOURS NOTICE MUST HAVE BEEN EITHER TO ACQUIRE TITLE TO THE COLLATERAL BY BARE LITERAL COMPLIANCE WITH THE POWER OF SALE OR WANTONLY TO SACRIFICE THE EQUITY OF THE PLEDGOR.

Where it is evident that the intent of the pledgor in selling the collateral was not in good faith, to

sell in a manner calculated to bring the highest price, but that his intention was to acquire legal title to himself in order to put himself in a stronger position for collection purposes, the sale will not be upheld as a valid sale in the foreclosure of the pledge.

Muhlenburg vs. Tacoma, 25 Wash., page 36, 64 Pacific, 925.

Thirty Thousand (\$30,000) Dollars of warrants of the City of Tacoma were pledged to Independence National Bank of Philadelphia as security for a loan of Twenty-five Thousand (\$25,000) Dollars, on which all except Eighteen Thousand (\$18,000) Dollars had been paid at the date of the attempted foreclosure of the pledge. The pledgor had become insolvent. The City of Tacoma was disputing the validity of the bond issue and cases were pending in the Supreme Court of the State of Washington to determine the validity of the bonds. The pledgee following strictly the terms of the pledge had the warrants sold at public auction and became the purchase for the sum of Five Thousand (\$5,000) Dollars. The President of the pledgee bank testified that the bonds were sold in accordance with a universal practice when a note was not paid to sell the securities protecting it in order to get title to the property so that the bank might be in a position to handle them to the best advantage. From this admission and the circumstances surrounding the case, the court found that the attempted sale of the

warrants was for the purpose of getting title to the warrants and not for the purpose of liquidating the pledge indebtedness. The court, White, J., after calling attention to the fact that the securities at the time of the attempted sale had no market value and that their value could be ascertained only after the litigation testing the validity of the bonds had been settled, and after reviewing authorities cited by the pledgee as sustaining the sale, uses this language (page 56):

“These are the cases cited by the appellant to sustain the alleged sale. In all these cases there was a market value to the thing sold at the time of the sale and the sale was for the purpose of liquidating the debt and actually realizing on the security.

“The power of sale must be exercised with a view to the interests of the pledgor as well as of the pledgee. The unfairness and inequitableness of this case consisted in attempting a sale when the pledgee knew there was no market value for the pledge, knew that he had to look to the pledged property alone for payment and knew that suits were pending to prove the pledge property of value far in excess of the amount of the debt for which they were pledged. Under such circumstances we think it was the duty of the pledgee to refrain from a sale of the pledged security until it was determined whether they were valid obligations or not. The Independence National Bank knew that it must get its money only out of the City of Tacoma upon these warrants, and that nothing could be realized from the insolvent pledgor, and that sale to itself would not add one dollar towards the payment of the debt. It would put the bank, however, in a position to receive almost twice its

debt, if by such sale, it could obtain title, and if the warrants, after litigation thereon, should prove to be valid obligations against the city. If the warrants were invalid, it would realize nothing; and this would be true whether it was the owner or not of the warrants, and whether there was a sale or not. There can be no pretense that there was any intention of realizing money by reason of this sale. The Bank had no purchasers in sight, and under the circumstances, could reasonably expect none.

* * * * *

“The Bank is in no way injured by the holding of this sale invalid, for it will receive in any event, its entire debt, interest and expenses and this is all it is equitably entitled to. Under the circumstances there appears to be no overpowering equity preponderating in favor of the appellant that would justify this court in placing the ownership of these warrants in his hands to the injury of the other creditors of the insolvent German-American Bank.”

What is said in the Washington case regarding the forcing of a sale when the pledgee knows the securities have no market value, and that there cannot reasonably be expected to be anyone to bid against him is peculiarly applicable to this case. The Metropolitan Trust Company knew that the value of the bonds and the extent of the properties covered by the trust deed which secured them were unknown to the commercial world. The bonds were not listed securities on the New York Exchange. They had no market or known value. How could the pledgee, in the exercise of reasonable business judgment, expect that a notice published in the

newspapers less than twenty-four hours prior to the sale would invite other bidders, or if it did by accident come to the attention of other possible bidders, how could it be expected that any such possible bidders could, prior to the sale and within twenty-four (24) hours, ascertain the value of the bonds? Sold as they were, they would have been regarded as so much waste paper by any possible bidder other than Metropolitan Trust Company. No reasonable man could have expected an advertisement of public sale published on such short notice to have brought to the sale a single bidder. The pledgee in this case did not expect it. It did not want it. What it did want was to secure legal title to the bonds, thereby diminishing none of its security, but increasing the amount of the debt held by it against the pledgor from Six Hundred Thousand (\$600,000) Dollars to Two Million Five Hundred Seventy-five Thousand (\$2,575,000) Dollars. To attempt this by the fiction of a public sale held on less than twenty-four hours' notice, where no one knew or could ascertain the value of the securities sold, was gross fraud upon the part of the pledgee charged with a trustee's obligation to protect the interest of the pledgor by selling the collateral in such a way and by such reasonable advertisement as would return the highest price. Actual intent to defraud there might not have been, but the procedure adopted amounts to fraud in law. True, in the Washington case above cited it

was admitted by the President of the pledgee bank that the intent of the bank in conducting the sale was to acquire legal title. In the case at bar there is no such express admission, but no such admission is necessary. Actions speak louder than words, and the procedure adopted here shows upon its face that the only purpose of the pledgee in offering the bonds for sale upon twenty-four hours' notice was to secure legal title. It is past belief that the pledgee would have consented to the purchase of the bonds by a third party for any such inadequate consideration ($11\frac{1}{4}\%$) as that which it bid.

The Washington case cites and relies upon the case of

Morris & Whitehead vs. East Side Railway,
95 Federal, page 13,

where this language is used:

“The real character of the transaction shows through all this circumlocution. The German Savings & Loan Society was not seeking to realize upon its securities, but to effect a transfer of the title of the bonds held by it to Morris & Whitehead. The sale, if it can be so called, was not a cash sale, as advertised, except as to the Ten Thousand (\$10,000) Dollars, which, when the amount involved is considered, appears to be too small a sum to have operated as an inducement for what was done. The debt of the Steels, except as to Four Thousand Nine Hundred and Seventy (\$4,970) Dollars, was simply transferred to Morris & Whitehead. I am

satisfied that the solvency of these bankers was not an inducement for the transfer. The security for the debt was the bond. The German Savings & Loan Society was merely playing into the hands of Morris & Whitehead, and if the former has no pecuniary share in the title derived from the sale, yet its conduct has all the consequences of such an interest to the debtors whose property was sold. But whether the pledgee may buy at his own sale is not considered. It is enough to defeat the sale that it was contrived between the seller and buyer in order to get the pledgor's title at a sacrifice of his interest, with that result. I am of the opinion that the purchasers of these bonds are only entitled to a decree for the amount of the debts for which the bonds were pledged and interest and costs; and this conclusion is based upon the fact that the selling to Morris & Whitehead was prearranged between the parties, that it was contrived by them as a means of acquiring the property pledged and that it is immaterial whether the German Savings & Loan Society have any interest in the sale or not. In reaching this conclusion we assume from the earning capacity of the railway, as shown of what appears in the case, that the bonds have a value greatly in excess of the price bid for them at the sale. If this is so, it is unconscionable that the mortgagors, or, what is the same thing, other creditors, shall loose this excess by the expedient of this sale, while some Five Thousand (\$5,000) Dollars of the original debt remains unsatisfied in the hands of the purchaser at the sale."

The last cited case was overruled by this court (see *Morris & Whitehead vs. East Side Railway*, 104 Federal 409), but the case is overruled upon the facts, not upon the law announced. The decision

on appeal leaves unaffected the doctrine announced that where the obvious intent of the pledgee was to secure title to the collateral, and not in good faith to liquidate the pledge indebtedness, the sale is invalid.

Perkins vs. Applegate (Ky. 1905), 85 S. W. 723.

“From the foregoing facts and circumstances and others proven in the case it is evident that appellant made no effort to dispose of this property with a view to benefit the appellees, but his purpose was to obtain the property for himself at the lowest possible price, regardless of the interest of those whom it was his duty to protect. This is contrary to law. It places a salutary restraint upon the pledgee to secure his fidelity and good faith, and he is held at his peril to deal fairly and justly with the pledgor. (Citing 2 Kent, 576-582; Benjamin on Sales, 35; 22 Am. & Eng. Enc. 885.)”

A SALE WITHOUT NOTICE TO THE PUBLIC IS NOT A PUBLIC SALE. THE FAIR CONSTRUCTION OF THE PLEDGE AGREEMENT IN THIS CASE IS THAT ADVERTISEMENT WAS WAIVED BY THE PLEDGOR ONLY IN CASE OF PRIVATE SALE.

The appellee in this case cannot rely upon the terms of the contract of pledge as excusing it from making reasonable advertisement of the public sale. The contract recites that the pledgee may sell at public or private sale, without either advertisement or notice, which are expressly waived. The reasonable and indeed the only construction of which this

clause is capable is that the waiver of advertisement has reference to advertisement in case of a private sale. The expression cannot refer to advertisement in case of public sale, because such a construction would involve a contradiction in terms. There can be no such thing as a public sale in the foreclosure of a pledge without notice to the public; that is, advertisement that such a sale will be held at public auction to which the public and probable purchasers are invited. If no advertisement of such a sale has been made it will be mere accident if other bidders than the pledgee are present. A sale so conducted is not a public sale, but a private sale held in a public place. The pledgor has safeguarded itself against the possibility of the pledgee buying the collateral at a sale to which other bidders have not been invited by the provision of the pledge agreement, which expressly limits the right of the pledgee, to purchase at a public sale. The contract does not authorize it to buy at private sale. Having no right under the contract to become the purchaser at a private sale, the pledgee in this case resorted to the fiction of a public sale, but was careful to see to it that the public and other bidders were not invited to be present by any reasonable notice or advertisement calculated to induce their attendance. We believe there is no case directly construing the terms of a pledge respecting advertisement such as is here involved, and holding that advertisement of public sale is waived; nor

is there any case which passes upon the validity of a pledge agreement which in express terms waives advertisement in case of public sale. We submit that the construction urged by the appellant is the only one which does not involve a conflict in terms and which does not lend itself to a harsh and unconscionable result. Courts have ever construed contracts of pledge in such a way as to safeguard the interests of the pledgor and to prevent the pledgee from taking unfair advantage of the pledgor.

Perkins vs. Applegate, Circuit Court of Appeals Ky. 1905, 85 S. W. 723.

The pledge agreement in this case provided that a pledgee "had full power to sell the collateral at any place in Covington, Kentucky, or elsewhere, at public or private sale, on non-performance of the above promise, and at any time thereafter, and without advertising the same or otherwise giving us any notice." The pledgee was authorized to purchase at a public sale. The pledgee, upon the maturity of the pledge obligation, advertised a public sale to be held on December 1st. On that date it was continued until December 11th. On conflicting testimony the court found that there had been no proper announcement made of the continuance. At the sale held on December 11th, with no one present, the auctioneer sold to himself, as agent for the pledgee. This language is used:

“It will be noted that the power of attorney appended to each of the notes authorized a private sale of the stock without advertisement or notice, but by clear implication precluded the holders of the notes from becoming the purchaser at such sale by expressly providing ‘That in case of public sale, the holder may purchase without being liable for more than the net proceeds of the sale.’ Unquestionably if the appellant had sold the stock at private sale to some *bona fide* third person as purchaser, the sale would have been good under this special contract. But having elected to sell at a public sale and holding the stock as pledgee and trustee, before he could acquire a valid title by purchase at his own sale, contrary to the general rule that no one can be seller and buyer at the same sale, he should be required to show that the sale was fairly made according to the terms of the contract at a ‘public sale.’ ”

The right of a pledgee to sell at public sale without advertisement of the sale, where the contract of pledge authorizes public or private sale without advertising the same, is necessarily passed upon and denied in the foregoing case.

Tennent vs. Union Central Insurance Co., St. Louis Court of Appeals, Mo. 1908, 112 S. W. 754, at 758.

Where the pledge agreement authorizes sale “At any time or place without notice, at public or private sale,” held that this did not excuse advertisement, and that although it was stipulated that the sale might be made at any place, a public sale must be made at a place accessible to the public, and that

a purported sale held in the offices of the insurance company which was the pledgee under the contract, was not a public sale. This language is used:

“The fact is, the policy was sold at auction by the Treasurer of the company, in the company’s office at Cincinnati, and no public notice whatever was given of the intended sale. Now, the very idea of a public sale involved, of course, notice thereof to the public, to the end that the public shall be invited as bidders, and further that the sale be had in a public place to which the public, one and all, may resort for the purpose.”

The case further holds that the provision authorizing sale without notice refers to notice to the pledgee, not notice to the public, citing other Missouri cases as sustaining the holding. The case is an authority in favor of the appellant’s contention in two respects: First, it is an instance of the policy of the courts to adopt such a construction of the pledge agreement as will safeguard the interests of the pledgor, and, second, it is an illustration of the doctrine that a pledgee must deal fairly and honestly with the pledgor, no matter what may be the terms of the pledge contract. The expression in

Hiscock vs. Varick Bank, 206 U. S. 28, 51
Law Ed. 945, at page 952, Law Ed.,

that “In the absence of fraud the pledgee may buy at his own sale held without notice or demand or advertisement, when power so to do is expressly granted by the pledgor,”

cannot be intended by the court as passing upon the question whether a waiver of advertisement such as is involved in the terms of the pledge in this case is valid as to a public as distinguished from a private sale. The point appears not to have been urged in the case, and as the court finds that upon sale of the collateral its full value was obtained, and that no unfair advantage was taken of the pledgor, whatever may have been said by the court in reference to the validity of the waivers in the pledge agreement is dictum. Moreover, an examination of the cases cited by the court as sustaining the general expression above quoted shows that each of the cases cited concerned the validity of an agreement of the pledgee waiving notice to the pledgor. In none of the cases was the validity of a waiver of advertisement involved or passed upon.

If the pledge contract does not waive advertisement in case of public sale, or if it does waive advertisement, but such waiver is invalid, then the pledgee in this case was bound to give reasonable notice of the public sale. It needs no argument to convince one that a notice published in the newspaper less than twenty-four hours previous to the public sale was not a sufficient notice where the securities offered for sale are neither listed, standard, marketable nor of a known value. Such a notice was neither published a sufficient number of times to be reasonably calculated to be brought to the attention of any considerable number of buy-

ers, nor was it given a sufficient time in advance of the sale to enable a buyer to whose attention it is brought to investigate the value of the securities. Selling the bonds in this case upon less than twenty-four hours' notice was absolutely certain to result either in a willful sacrifice of the securities or in the acquisition of legal title for a trifling amount by the pledgee. It is inconceivable that the pledgee in this case would have permitted a third party to purchase these bonds which it had accepted as security for Six Hundred Thousand (\$600,000) Dollars for the insignificant price of Twenty-five Thousand (\$25,000) Dollars, and it is inconceivable that if the pledgee had actually intended in good faith to get the highest value out of the bonds, it would have called the sale on less than twenty-four hours' notice. Its only purpose and expectation in conducting the sale as it did must have been to acquire title to the securities at a small price, and thereby strengthen its position for collection purposes without losing any of its security.

THE PLEDGEE IN THIS CASE WAS CHARGED WITH A TRUSTEE'S OBLIGATION TO GET THE HIGHEST CASH VALUE OUT OF THE COLLATERAL. IF IT FAILED TO ACT REASONABLY AND FAIRLY IN THE CONDUCT OF THE SALE WITH THIS PURPOSE IN VIEW, NO MATTER WHAT THE TERMS OF THE PLEDGE AGREEMENT, THE SALE IS INVALID.

Foot vs. Utah Commercial Bank, 54 Pacific
104.

Where certain corporate stocks were pledged as security for a note of Eight Thousand (\$8,000) Dollars under an agreement that the pledgee, on default, might sell at public or private sale, and the pledgee, without notice or advertisement of any sort, pretended to sell at auction at the front door of its bank the stock pledged, and purchased the same for an amount sufficient to discharge the principal obligation, but at less than one-half of the value of the stock. The court, in holding the sale invalid, uses the following language:

“No doubt the terms of the contract governed the rights of the parties as to the time and place and notice of sale, and should be strictly pursued without evasion or deception. The officers of the bank were empowered to sell at public or private sale. They choose to make the sale public, and were therefore required to conform to the rules governing public sales so far as publicity was concerned. This they did not do. The power of sale must be exercised with a view to the interest of the pledgor, as well as the pledgee, and the sale should not be forced for barely sufficient money to secure the payment of the debt when the securities are known to be more than double the value of the debt. The pledgee in whom such an authority to sell is vested must exercise it under a trust for the debtors’ benefit, as well as his own. The sale must be fair and the contract must be construed benignantly for the debtors’ interest as well as that of the pledgee.” (Citing Colebrook, Collateral Securities, Sec. 118.)

* * * * *

“It is evident to our minds that in the manipu-

lation and conduct of this sale, and in the purchase of the stock, the bank did not exhibit that fair, benignant, strict good faith and reasonable degree of effort and diligence that was justly required in order to secure and protect the interest of the party who entrusted it with the power."

The foregoing case relies upon

Montague vs. Dawes, 14 Allen 373,

where the following language is used:

"One who undertakes to execute a power of sale is bound to the observance of good faith and a suitable regard for the interest of his principal. He cannot shelter himself under a bare literal compliance with the conditions imposed by the terms of the power. He must use a reasonable degree of effort and diligence to secure and protect the interest of the party who entrusted him with the power. A stranger to the proceedings, finding them all correct in form and purchasing in good faith, may not be affected by his unfaithfulness, but whenever his proceedings can be set aside without injustice to innocent third parties, it will be done upon proof that they have been conducted in disregard of the rights of the donor of the power. When a party who is entrusted with a power to sell attempts also to become the purchaser he will be held to the strictest good faith and the utmost diligence, for the protection of the rights of his principal. If he fail in either he ought not to be permitted thereby to acquire any irrevocable rights which he can set up against a party whose interest he has sacrificed."

Laclede National Bank vs. Richardson, Mo.
1900, 56 S. W. 1117.

Where notes of the face value of Forty Thousand (\$40,000) Dollars were pledged to secure a loan of Twenty Thousand (\$20,000) Dollars, which at the time of the attempted foreclosure of the pledge had been reduced to Five Thousand (\$5,000) Dollars. The pledge agreement provided that the pledgee might at public or private sale, or otherwise at its option, without notice, and should have the right at any such sale to purchase the pledged property. Notice of the sale was given to the pledgor and advertisement thereof made in a daily newspaper on the 15th, 16th, 17th and 18th days of February. The sale took place at eleven o'clock on February 19th. The sale was advertised to take place at the front door of the court house. The weather being disagreeable, those present repaired inside the glass storm doors of the entrance. The collaterals were bid in by the bank for the sum of Eight Thousand Eight Hundred and Twenty-five (\$8,825) Dollars. There were three or four bidders at the sale. The collaterals were sold for about one-fifth of their actual value. In holding the sale invalid the court uses this language:

“Neither did the bank exercise a sound discretion in selling the securities when only three or four bidders were present and the weather so inclement that the parties in attendance were compelled to retire within the glazed storm doors of the court house, and there, out of public view, sell notes and mortgages having a face value of Forty Thousand (\$40,000) Dollars and upward to itself for

about one-fifth of the actual value of such securities, a sum so grossly inadequate that the mere statement shows there must have been some mismanagement on the part of the pledgee. While it is true as a general rule that such sales will not be set aside for mere inadequacy of price, providing proper diligence was used by the Trustee in selling, yet where, as in this case, the weather was so inclement that those present were compelled to withdraw inside the storm doors of the court house, the bidders so few and the sum offered so low, the bank, in the exercise of a sound discretion, should have adjourned the sale until such time as the same could have been made under more favorable circumstances. Having failed to do so, the sale might for that reason have been set aside. In discussing the duty of the Trustee in adjourning a sale where there were only a few bidders and the sum offered inadequate to the value of the property, Perry, Trusts, 4th Ed., Sec. 602, says: 'If an adjournment of the sale is not prohibited by the power, the donee of the power may adjourn the sale to another time. Such power is implied. Of course, it is a discretionary power. It must be exercised in good faith. It may be the clear duty of the Trustee to adjourn the sale, and an evidence of bad faith not to adjourn it, as if there are few or no purchasers, and the bids are very low and inadequate to the value of the property.' Having power under the exercise of a sound discretion, it was the clear duty of the bank to adjourn the sale in order to prevent a sacrifice of the securities and obtain a fair price therefor. (See Jones, Mortgages, 2nd Ed., Sec. 1873.) The trust relation occupied by the bank toward the pledgor made it incumbent upon the former to obtain the best possible price and to use every reasonable means to obtain the full value of

the pledged property. The conditions of the weather and the absence of any considerable number of bidders rendered an adjournment necessary in order to prevent a sacrifice of the securities. In view of the character of the securities sold consisting of numerous notes, secured by sundry deeds of trust on different lots of land, we do not think the bank exercised a proper discretion in selling on four days' notice. The notice given was wholly inadequate to enable prospective buyers to investigate into the value of the securities offered. In the sale of the collaterals in question the amount to be realized therefrom, is governed to a great extent at least by the value of the property embraced in the deeds of trust securing the same. Consequently, time and opportunity should have been given for an examination of the notes and property covered by the deeds of trust securing the same. It was expecting too much within the four days given to examine all these matters; and it certainly cannot be claimed any prudent person would have sold similar securities on such short notice, owned absolutely by himself."

The above case is cited and quoted with approval by Jones on Pledges and Collateral Securities, page 682, Sec. 635a, where this language is used:

"Even in case the power of sale provides that the pledgee may purchase at the sale, this will be held invalid if the sale was not advertised and was conducted without regard for the pledgor's interest."

Clark vs. Simmons, Massachusetts 1890, 23 N. E. 108.

Where, upon foreclosure of mortgage under

power of sale, the mortgagee purchased the property for at least Two Hundred (\$200.00) Dollars less than its fair value, the court (Knowlton, J.), in holding the sale invalid, used the following language:

“It has repeatedly been held in this commonwealth and elsewhere that a mortgagee who attempts to execute a power of sale contained in the mortgage is bound to exercise good faith, and to use reasonable diligence to protect the rights and interests of the mortgagor under the contract. (Citing cases.) If he fails to do his duty in this respect, a mere literal compliance with the terms of the power will not render the sale valid against the mortgagor in favor of one charged with knowledge of the delinquency, although it may be sufficient if the purchaser is a stranger who buys in good faith. In determining whether in a particular case a mortgagee has acted in good faith, and with a due regard for the interests of the mortgagor, the nature of his authority must be considered. He has a right, after giving the prescribed notices, to have the mortgaged property sold at auction for the payment of his debt. It is his duty for the benefit of the mortgagor whom he represents to so act in the execution of the power as to obtain for the property as large a price as possible. Ordinarily the parties stipulate in the mortgage what kind of notices of the sale shall be given, and ordinarily a mortgagee is not required to give a notice of a different kind. So far as the mortgage leaves him a power of selection of methods of giving notice and making the sale, he is to act reasonably and exercise a sound discretion. The contract implies that, upon notice prescribed, an auction sale can be had; that is, that bidders will be attracted, so that the property can be sold. A

sale at auction necessarily involves the presence of one or more persons who are willing to buy. If the notices given fail to bring such, a power to sell at auction cannot be executed. If the mortgagee is not authorized to purchase and no bidders are present, it is quite obvious that no sale can be made. And if the only person who will buy at all will offer only a small part of the well known value of the property, the conditions which under the contract are impliedly essential to the execution of the power are wanting, and it is the duty of the mortgagee either to abandon his attempt to sell or to adjourn the sale until he can obtain the presence of bidders. Good faith and a reasonable regard for the interest of the mortgagor will not permit him to make a sale when no one will offer him a price which an owner could reasonably think of accepting, if he were obliged to sell the property at a day's notice for what it would bring. In such a case, where the notices given have failed to accomplish the purpose which the contract contemplated that they would accomplish, it is the duty of the mortgagee, if he would make a sale properly, to represent not only his own right to have the estate sold for his benefit, but also the right of the mortgagors to have an auction sale such as both parties must be presumed to have contemplated by their contract, and to get for the property as much as it can reasonably be made to bring. Under such circumstances he should do what a reasonable man would be expected to do to accomplish that result. A failure to do that would be evidence of a want of good faith; and such a neglect without an active purpose to defraud would invalidate the sale unless it was made to a stranger who bought in good faith."

Hagen vs. Continental National Bank, Mo.
1904, 81 S. W. 177.

The pledge agreement provided that the shares

of stock pledged as collateral might be sold by the pledgee at public or private sale, with or without notice, at such place and on such terms as the pledgee might deem best, with the right to purchase at any such sale. The bank without notice or advertisement attempted to sell the stock on the Merchant's Exchange and became the purchaser for the sum of Five Thousand (\$5,000) Dollars. The stock appears to have been worth approximately Thirty Thousand (\$30,000) Dollars. In holding the sale invalid the court uses this language:

“In view of these just and well settled principles of equity, it must be held that under the power given the bank, (the defendants in this case, to sell at public or private sale, with or without notice, it still remained its duty to make the sale fairly and with a view to make the securities sell to the advantage of the pledgor, the plaintiff herein, as well as its own interest. This trust, broad and ample as it was, was not intended as a power of attorney to go through a meaningless form by which plaintiff's stock was to be sacrificed without any regard to fairness.”

* * * * *

“It requires little discrimination to see that this was a more unreasonable and unfair exercise of power conferred to sell at public sale. It cannot be doubted that defendant was attempting to make what it considered would be a compliance with the power to sell at public sale, and it seems to us that no one can fail to condemn it as inequitable and unjust to plaintiff and a ruthless sacrifice of his stock. Moreover, if the bank intended to execute the power to sell at a public sale, as all the evidence

tends to show, it was bound to pursue the methods ordinarily adopted in making sales, and such sale presupposes a sale at a public place—a place to which the public can have access. Such a place the Merchants' Exchange, from which the public is barred, is not."

* * * * *

"The result was such as can always be anticipated under such circumstances. The stock which the bank took as security for over Twenty Thousand (\$20,000) Dollars indebtedness sold for Five Thousand (\$5,000) dollars. The Circuit Court was clearly right in setting aside the sale, and we have no doubt whatever of the jurisdiction of the court of equity to avoid such a sale."

Colebrook on Collateral Securities, Sec. 118.

"Such a power (power to sell) given by contract, however, so far as it enables the pledgee to extinguish the right of the pledgor to redeem, will, as in other contracts affecting equities of redemption, be construed favorably for the interest of the pledgor so far as it is consistent with the rights of the pledgee. The power of sale must be exercised with a view to the interest of the pledgor, as well as pledgee, and the sale must not be forced for barely enough money to secure the payment of the debt."

2 Perry on Trust, 4th Ed., Sec. 602o.

"Trustees and mortgagees in the execution of their power must use the utmost good faith towards all parties in interest. This proposition cannot be too strongly stated and enforced. They must act impartially for every person who has any rights in the estate."

* * * * *

"They must use every effort to sell the estate under every possible advantage of time, place and

publicity. They must exercise every discretion, so far as they have any, in an intelligent and reasonable manner."

Idem, 602x, regarding the exercise of a power of sale by a Trustee.

"They are scrutinized by courts with great care and will not be sustained unless conducted with all fairness, regularity and scrupulous integrity."

* * * * *

"If publicity of the sale is not given, or if the proceedings are in any way contrary to justice or equity, the sale will not be allowed to stand."

THE INADEQUACY OF PRICE IN THIS CASE IS SO GREAT AS TO CONCLUSIVELY PROVE LACK OF GOOD FAITH ON THE PART OF THE PLEDGEE IN THE CONDUCT OF THE SALE.

While the rule is generally stated that mere inadequacy of consideration will not avoid the sale, this must be taken with the qualification that the inadequacy must be so great as to shock the conscience of the court or indicate a wanton disregard of the rights of the pledgor in the conducting of the sale. That the inadequacy may be so gross as to raise the presumption of fraud, is stated in

Hiscock vs. Varick Bank, 206 U. S. 28, 51 Law Edition 945, at 952.

where the following language is quoted from the opinion of the lower court, and approved:

"Doubtless the pledgee cannot avail himself of his authority, however unlimited, to sacrifice the

property wantonly or to purchase it himself at a valuation so inadequate as to suggest fraud."

If there has ever occurred a case where the inadequacy of price paid indicated fraud or want of good faith toward the pledgor in the proceedings incident to the sale, we believe this to be the case. Here Two Million (\$2,000,000) Dollar first mortgage bonds, which four months previously the pledgee had regarded as of sufficient value to accept as security for a loan of Six Hundred Thousand (\$600,000) Dollars, were at public sale, on less than twenty-four hours' notice to the public, bought in by the pledgee for Twenty-five Thousand (\$25,000) Dollars, or one and one-fourth per cent. of their face value. The only evidence of the actual value of the property covered by the bond issue is the report of the appraisers in bankruptcy, from which it appears that if we accept the minimum value, placed upon it by the appraisers as the quick sale for cash value after bankruptcy had intervened and the plant had ceased to be a going concern, the properties were worth a minimum of Three Hundred Sixty-six Thousand Thirty-five (\$366,035) Dollars. While as a going concern in the hands of a company strong enough to finance it adequately, the same properties were worth a minimum of Six Hundred Sixty-six Thousand Nine Hundred (\$666,900) Dollars. This valuation was made after the Western Steel Corporation had become a defunct concern, and after the project had become discredited in the eyes of the

public by the bankruptcy proceedings. If the properties were worth that amount in January, 1912, they were worth at least that amount at the date of the attempted sale by the pledgee. Moreover, the pledgee, who, by the terms of the order of the sale in bankruptcy was authorized to bid the bonds as purchase price of the assets covered by the mortgage trust deed to the amount of Six Hundred Fifty Thousand (\$650,000) Dollars, did in fact bid them to the extent of Six Hundred Forty-seven Thousand (\$647,000) Dollars. Why the pledgee should have been willing to bid Twenty-five Thousand (\$25,000) Dollars only of its indebtedness at the attempted sale of the collateral, but was willing to bid Six Hundred Forty-seven (\$647,000) Dollars, seven months later at a sale in bankruptcy, seems to require explanation. It may have been because the attempted sale on foreclosure of the pledge was held on less than twenty-four hours' notice to the public, while the sale in bankruptcy was properly advertised and conducted in good faith and the appellee had reason to fear that if it did not bid at least Six Hundred Forty-seven Thousand (\$647,000) Dollars for the properties, some other purchaser would do so.

Fidelity Insurance Company vs. Roanoke Iron Co., 81 Federal 439,

will probably be relied upon by the appellee as an authority contrary to the position taken by appellants in this case. In that case it appears that

twelve of the One Thousand (\$1,000) Dollar bonds of the Roanoke Iron Company were pledged to one Gwinner as security for a loan of Five Thousand (\$5,000) Dollars. The pledge agreement authorized sale at public or private sale without advertisement or notice. Whether advertisement was made does not appear from the opinion, nor does it appear at what price the pledgee purchased the collateral. It is plain, however, that the sale, such as it was, was made at the request of the Secretary of the pledgor company. The only question involved was, whether the pledgee had the right to become the purchaser, and whether, as such, he can enforce the bonds to their full amount. The regularity of the sale appears not to have been questioned. There is no showing as to the value of the bonds, and at whatever price they may have been purchased, there is no intimation in the opinion that the bonds at the sale did not bring their full value.

Atlantic Trust Co. vs. Woodbridge Canal Co., 86 Federal 975,

relied upon as an authority by the appellee, merely decides that where the pledgee purchases the bonds of the pledgor at the sale held on foreclosure of the pledge, it is entitled to enforce them to their full face value. No question was raised or discussed in the case regarding the regularity of the sale or the adequacy of the price paid by the pledgee.

Farmers' Loan and Trust Co. vs. Toledo Co., 54 Federal 759,

relied upon by the appellee as an authority, is not

in point. From the opinion (page 774) it appears that the bonds sold for approximately ten per cent. of their face value. As to the actual value of the bonds nothing appears in the opinion of the court. The case further decides that any question as to the purchaser's title to the bonds on account of inadequacy of price or irregularity in the sale cannot be raised by the intervener, Young. It affirmatively appears on page 773 of the opinion that the pledgor has never controverted or disputed the bank's title and ownership of the bonds.

In re Mertens, 144 Federal 818,

which may be cited as an authority favoring the appellee, holds that a pledgee, even after bankruptcy of the pledgee, may foreclose his pledge by sale of the collateral. Two life insurance policies were sold and bought in by the pledgee. No testimony was offered to show that the policies were actually worth more than the amount bid. (See page 821.) The regularity of the sale in other respects was not questioned. The court therefore found no ground for setting aside the sale.

The case was appealed to the United States Supreme Court and is reported *sub nomine*.

Hiscock vs. Varick Bank, 206 U. S. 28, 51
Law Ed. 945,

in which case the court reaches the conclusion that upon the sale held by the pledgee, the policies pledged as collateral brought their full value, and

that at any rate nothing upon the face of the record justified a charge of fraud in the management of the sale on account of inadequacy of price received.

Farmers' National Bank vs. Venner, Mass.
1906, 78 N. E. 540,

relied upon by the appellee as an authority in its favor, is distinguishable from the case at bar in the fact that the bonds involved in the case were the obligations of a third party, and there was no fraud or irregularity in the sale other than the charge that the price paid for the bonds was inadequate. It does not appear from the opinion what price was received for the bonds upon the sale. It further appears that the defendant, though having information of the sale shortly after it took place, took no steps to set the same aside until nearly six years afterward.

Cases may be cited by the appellee upholding a sale of pledged collateral where the price for which the pledgee purchased the collateral appears to have been inadequate, but all such cases are distinguishable from this case either by the fact that the collateral was not the obligation of the pledgor, by the fact that the regularity of the sale could not be questioned, or if questioned was not subject to attack by an intervener, or by the fact that no showing was made that the price paid by the pledgee was less than the actual value of the collateral. We confidently assert that no case can be cited involving in its facts all of the elements which are present

in this case, namely: A sale at public auction of bonds which were not standard or listed securities, and which had no market value, on less than twenty-four hours' notice to the public; a failure to adjourn the sale to a later date when it appeared that no other bidders were present; the purchase by the pledgee for the sum of Twenty-five Thousand (\$25,000) Dollars, or one and one-fourth per cent. of their face value, of the bond issue, which was the obligation of the pledgor, where four months previously the pledgee had regarded the said bond issue as sufficient security for a loan of Six Hundred Thousand (\$600,000) Dollars, and where from the only evidence in the case—the reports of the appraisers—it appears that the actual value of the property securing the bonds was, on a quick sale for cash basis, after bankruptcy, at least Three Hundred Sixty-six Thousand (\$366,000) Dollars, and that in the hands of one able to finance the project, *i. e.*, any purchaser other than a speculator, the property was worth at least Six Hundred Sixty-six Thousand (\$666,000) Dollars; the result that by the fiction of a public sale the pledgee, bound to a trustee's obligation to protect the pledgor in the sale, increased his demand upon the pledgor from Six Hundred Thousand (\$600,000) Dollars to Two Million Five Hundred Seventy-five Thousand (\$2,575,000) Dollars without any change in his security.

We believe that plain justice and ordinary honesty on the part of the pledgee required it to give

public notice of the proposed sale more than twenty-four hours in advance thereof, and in any event to adjourn the sale to a later date when it appeared that no other bidders were present. To fail in these respects was in violation of its duty as a trustee charged with protecting the interest of the pledgor as well as its own interest, in getting the highest price obtainable out of the collateral, and betokened an intent, not to be guided by its duties as such trustee, but to acquire legal title to the collateral at the smallest possible price to itself, in total disregard of the rights of the pledgor, in order to put itself in a more advantageous position for collection purposes.

Such a harsh and unfair result reached by the methods resorted to in this case, we submit, is contrary to elemental principles of justice and fair dealing among men. The claims of appellee as filed so far outrank in amount the total of all other unsecured claims that unless expunged they will be entitled in dividends to practically all of the surplus funds of the estate (approximately Ten Thousand (\$10,000) Dollars), other creditors will get practically nothing. We respectfully submit that the case should be reversed, with instructions to expunge the claims.

MUNN & BRACKETT,
Attorneys for Appellants.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LESTER TURNER, SUTCLIFFE
BAXTER and EDGAR AMES, as
TRUSTEES IN BANKRUPTCY OF WEST-
ERN STEEL CORPORATION,

Appellants,

vs.

METROPOLITAN TRUST COM-
PANY of the CITY OF NEW
YORK,

Appellee.

No. 2257.

*Appeal from the District Court of the United States
for the Western District of Washington, North-
ern Division, Sitting in Bankruptcy.*

Brief of Appellee

FREDERICK BAUSMAN,
DANIEL KELLEHER,
ROBERT P. OLDHAM,
ROBERT C. GOODALE,
Solicitors for Appellee.

Office and Post Office Address:
1408 Hoge Building,
Seattle, Washington.

INDEX TO BRIEF.

	Page
Statement of the case	3
Facts regarding bonds	4
Summary of objections urged by appellants.....	7
Appellants' contention regarding pledged additional obligations of pledgor	8
Discussion of appellants' authorities on this point	14
Summary of authorities sustaining pledgee's title to such securities	16
Argument on question of fraud.....	23
Fraud never charged	24
Burden of proof is on appellants to prove fraud	25
Concurrent findings of Referee and District Judge	25, 42
Sufficiency of notice	26
Value of bonds	28
Analysis of appraisal	29
Price at which bonds sold	36
Lack of evidence of fraudulent purpose.....	38
Intention of parties as to foreclosure, and final test of value of securities.....	39
Discussion of appellants' authorities on question of fraud	42
Authorities approving similar sales.....	46
Sufficiency of the notice on the sale of the bonds	46
Appellants' authorities as to this.....	53
Inadequacy of price not shown, and even if shown, not a defense	54
Appellee's authorities on this point.....	55
Discussion of appellants' authorities on this point	64
Laches and Estoppel	65

INDEX OF CASES CITED.

Authorities Cited by Appellants.

<i>Foot v. Utah Bank</i> , 54 Pacific 104.....	53, 64
<i>Knickerbocker Trust Co. v. Penacook Mfg. Co.</i> , 100 Fed. 814	16, 18
<i>Laclede National Bank v. Richardson</i> , 56 S. W. 1117	53, 64
<i>Montague v. Dawes</i> , 14 Allen 373.....	64
<i>Morris v. East Side Ry. Co.</i> , 95 Fed. 13.....	44
<i>Muhlenberg v. Tacoma</i> , 25 Washington 36.....	42, 44
<i>Peacock v. Phillips</i> , 93 N. E. 415.....	11, 15
<i>Perkins v. Applegate</i> , 85 S. W. 723.....	45
<i>Tennant v. Union Central Ins. Co.</i> , 112 S. W. 754	53

Authorities Cited by Appellee.

<i>Atlantic Trust Co. v. Woodbridge C. & I. Co.</i> , 86 Fed. 975	17, 19
<i>Chouteau v. Allen</i> , 70 Mo. 290.....	56, 59
<i>Collier on Bankruptcy</i> , (9th Ed.) p. 547.....	25
<i>Farmers' L. & T. Co. v. Toledo & S. H. R. Co.</i> , 54 Fed. 759	16, 17, 46, 56, 57
<i>Farmers' National Bank v. Venner</i> , (Mass.) 78 N. E. 540	26, 46, 56, 61
<i>Fidelity Insurance Co. v. Roanoke Iron Co.</i> , 81 Fed. 439	17, 20, 46, 56, 57, 62
<i>Franklin National Bank v. Newcombe</i> , 37 N. Y. Sup. 271; 51 N. E. 1090.....	44, 56, 63
<i>Gilchrist T. Co. v. Phoenix Ins. Co.</i> , 170 Fed. 279	17, 18

<i>Hiscock v. Varick Bank</i> , 206 U. S. 28.....	25
<i>Jones on Pledges & Collateral Securities</i> , 2d Ed., Sections 735 and 727	55, 56
<i>Loveland on Bankruptcy</i> , (4th Ed.) Sec. 847.....	25
<i>In re Mertens</i> , 144 Fed. 818.....	55, 56, 63
<i>Morris & Whitehead v. East Side Ry.</i> , 104 Fed. 409	44, 46, 56, 58
<i>Naylor v. Christiansen Harness Mfg. Co.</i> , 158 Fed. 290	25
<i>Neufelder v. Third Street Ry. Co.</i> , 23 Washing- ton 470	30
<i>Remington & Ballinger's Washington Code</i> , Sec. 1149	35
<i>Sherrick v. Cotter</i> , 28 Washington 25.....	30
<i>Smith v. National Suffolk Bank</i> , 127 Fed. 286.....	25
<i>In re Sweeney</i> , 168 Fed. 612	25
<i>Wheelwright v. St. Louis N. O. & O. C. T. Co.</i> , 56 Fed. 164	17, 20, 46, 56, 58
<i>White, Receiver, v. City of Rahway</i> , 16 Fed. 833	26, 56, 60
<i>In re Woods</i> , 52 Maryland 520.....	17, 21
<i>Zimmermann v. Bosse</i> , 60 Washington 556.....	30

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

LESTER TURNER, SUTCLIFFE
BAXTER and EDGAR AMES, as
TRUSTEES IN BANKRUPTCY OF WEST-
ERN STEEL CORPORATION,

Appellants,

vs.

METROPOLITAN TRUST COM-
PANY of the CITY OF NEW
YORK,

Appellee.

No. 2257.

*Appeal from the District Court of the United States
for the Western District of Washington, North-
ern Division, Sitting in Bankruptcy.*

Brief of Appellee

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court, sitting in bankruptcy, allowing the claim filed by Metropolitan Trust Company, appellee, against the bankrupt estate of Western Steel Corporation. The Trust Company's claim, allowed by the District Court, is based on \$2,000,000 of first

mortgage bonds of the bankrupt and on a promissory note of the bankrupt for \$600,000, upon which certain credits have been endorsed.

The \$2,000,000 of bonds were originally held by the Trust Company as collateral to the \$600,000 note, and the only question to be determined on this appeal is whether, by foreclosure in accordance with the terms of the pledge, the Trust Company terminated the pledge relationship and acquired a clear title to the bonds.

The facts regarding the note and bonds, and the Trust Company's ownership of them, are not in dispute, and are as follows:

Facts Regarding Bonds.

The Trust Company loaned the bankrupt \$600,000 on the bankrupt's four months' note for \$600,000, set forth in the Trust Company's proof of claim, taking as collateral the \$2,000,000 of first mortgage bonds now in controversy.

The pledge agreement (Transcript, p. 50) authorized the pledgee, on default in payment of the note, to sell the collateral at public or private sale, without either advertisement or notice, which, by the terms of the pledge, were expressly waived.

At any public sale of the collateral, the Trust Company was, by the terms of the pledge agreement, entitled to become a purchaser. The note fell due August 1, 1911, and on that day *the Trust Company notified the maker, Western Steel Corporation, that if the note was not paid on or before August 28, the securities would be sold at public auction on August 30, and that the Trust Company would look to the maker for any deficiency remaining after the sale.* (Transcript, p. 53.) This letter was duly received, and acknowledged by letter of Western Steel Corporation, by its president, dated August 11, 1911, in which no objection was made to the sale of the collateral at the time fixed, in case the note remained unpaid. (Transcript, p. 54.) The note was not paid and the collateral bonds were sold at public auction on the date set in the Trust Company's letter of August 1st. (Transcript, p. 20.) The auction sale at which the bonds were sold was a regular weekly sale of stocks, bonds and financial securities generally, admittedly largely attended by buyers of such securities (Transcript, p. 21). It was advertised in the best media for reaching buyers of such securities (Transcript, p. 20). Notices of the sale were mailed to the principal bond buyers, banking and financial corporations, firms and individuals

in the financial district of New York City (Transcript, p. 20).

At the sale the bonds were purchased in behalf of Metropolitan Trust Company as the highest and best bidder, for the sum of \$25,000 (which amount was credited upon the \$600,000 note (Transcript, p. 20).

The trustees, while admitting that the advertising was in the proper media, do not admit that it was sufficiently long-continued for the sale of unlisted securities, but the only evidence on the point is to be found in the testimony of Brayton Ives (Transcript, p. 44), and of Andrew J. McCormack (Transcript, p. 55). From their affidavits it appears that the notice given was such as is usual in the sale of such securities, and that the regular weekly sales, at one of which these bonds were sold, are sales of exactly the class of securities to which these bonds belong, *i. e.*, unlisted stocks and bonds which are not dealt in on the New York Stock Exchange, nor sold on the curb.

Appellants' statement of facts relative to value and appraisal of the property of Western Steel Corporation is erroneous, but as this involves a general discussion of the trustees' third ground of objection to the order of the District Court, we will

take it up under our argument on that point (III) *infra*.

More detailed facts regarding the sale of the bonds in New York will also be stated hereafter, under III.

ARGUMENT.

The bankruptcy trustees attack the decree of the court below on the following grounds:

I. *That pledged collateral consisting of additional obligations of the pledgor, such as the pledgor's corporate bonds, though secured by mortgage, cannot, even by the most scrupulous observance of the contract of pledge, be foreclosed so as to transfer to a purchaser, whether the pledgee or another taking with knowledge of the facts, any title to the pledged securities.*

II. *That, on the evidence presented, both the Referee and the District Court were wrong in their respective findings that our sale of the bonds in New York was made honestly, fairly, and without fraudulent intent, and that, (a) from the evidence of the notice given, and (b) from alleged inadequacy of the price at which the bonds were bid in, this court should reverse this finding in which the Referee and the District Judge both concur, and*

should find that the sale of the bonds in New York was conceived and carried out for the fraudulent purpose of preventing the public from bidding upon the pledged bonds, and in order, by a secret and colorable sale, to fraudulently increase the amount of the Trust Company's claim.

III. *That the public notice was unreasonably short and the sale therefore invalid, because not a public sale.*

IV. *That the sale was bad because of inadequacy of price.*

Without preliminary discussion of the general features of the case, we will separately consider the above four grounds on which the appellant trustees ask this court to reverse the decree of the District Court.

I.

Concerning appellants' claim that pledged collateral consisting of additional obligations of the pledgor, such as the pledgor's corporate bonds, though secured by mortgage, cannot, even by the most scrupulous observance of the contract of pledge, be foreclosed so as to transfer to a purchaser, whether the pledgee or another with knowledge of the facts, any title to the pledged securities.

To our minds the mere clear statement of this contention seems enough to condemn it as inconsistent with the intention of the parties and the needs of business. Sustaining the trustees would amount to cancelling the contract between the parties, without returning the money which the lender has advanced upon the faith of it.

Contracts of pledge are usually, as in the case at bar, entered into in consideration of a cash loan by the pledgee to the pledgor, and the loan is made in reliance on the collateral and on the pledgor's contract that the collateral may be sold and the pledge relationship terminated at the time and in the manner set forth in the contract of pledge. Admittedly contracts permitting the sale of pledged securities at public or private sale, are in general valid and enforceable, and if a corporation purchases bonds of another corporation, and pledges them to a bank as collateral for a loan of less than their value, and upon default, the bank, in accordance with the contract of pledge, sells the collateral, such sale is valid and terminates the relation of pledgor and pledgee, and the purchaser, whether the pledgee himself or a stranger, acquires an absolute and indefeasible title to the pledged property, free of any right of the pledgor to redeem it. But our opponents claim

that if, instead of pledging bonds of another company, the pledgor prefers to pledge its own mortgage bonds, though of the same value and pledged for a loan of the same amount, such contract of pledge is for some reason invalid and unenforceible, and the pledgee cannot rid himself of the pledged collaterals.

In order to demonstrate the unsoundness of this suggestion we must consider what rights would be given such a pledgee under the theory advanced in behalf of the bankruptcy trustees.

The trustees do not claim that the pledge itself is invalid, but admit that the pledgee should eventually have the benefit of the security. They say, however, that he cannot exercise the power given him in the contract of pledge, to sell the collateral and to become himself a purchaser. How then is the pledgee to enforce his security? The trustees' contention appears to be that he must hold the bonds until the liquidation of the pledgor company's assets, and that, in the meantime, he is deprived of his contract right to sell the bonds at public or private sale and to become, if he so desires, himself a bidder at such sale.

It is manifestly the intention of both parties that in case of foreclosure of the pledge the bonds de-

posited as collateral shall be sold as existing securities, and not that the mortgage securing the same shall be foreclosed, or the properties covered by such mortgage bid in and reduced to possession.

The latter course would usually be less favorable to the pledgor-mortgagor company, and would often be disastrous to it.

It would also, in many cases, *be impossible*, since, if the bonds did not bear annual interest, or if the interest were kept paid up, *the mortgage might not be in default, though the principal debt, as security for which the bonds were pledged, might be long overdue.*

The sole remedy and means of foreclosure open to the pledgee would, in such case, be by sale of the collateral bonds; and if that right were to be denied, it would amount to a total denial of his right to realize on his security.

Appellants may say that under their doctrine the creditor could at any time sell his interest as pledgee in the pledged property, such being, in one of the cases cited (*Peacock vs. Phillips*, 93 N. E. 415), held to be the effect of a sale of the collateral in accordance with the contract of pledge.

But who would purchase a mere pledgee's right in bonds pledged for an overdue debt, if the bonds could not be sold so as to convey a clear title to them? The mortgaged property might depreciate or the value of the bonds fall before a default should occur under the mortgage, and cumbrous foreclosure proceedings would absorb time and money before anything could be realized by such procedure.

Under such a rule, on default of payment, a pledgee obliged to realize within a reasonable time upon his collateral, *would be forced to sell his loan at a heavy sacrifice* to some speculator willing to hold it until the pledged obligations should themselves mature, and until they could be foreclosed.

The intent of the parties that the pledgee should sell the only thing pledged, i. e., *the bonds*, and quickly liquidate the security, would be utterly defeated and violated.

Appellants Ask Court to Make New Contract for Them.

It is idle to ask this court to make a new contract for the parties. If the pledgee had a right to sell the bonds at all, it had under the contract a right to become the purchaser, and on becoming the purchaser it acquired as good a title as any other

purchaser. That is the meaning of the provision that "the pledgee may become a purchaser,"—not that the pledgee may purchase what it owns already, *a pledgee's interest, but that it may purchase what is offered for sale, the full legal title to the thing pledged.*

If the pledgee bids at a public sale and the bonds are knocked down to him as the highest bidder, he must take the same title as any other purchaser, for if he took as pledgee still, his relation to the bonds would, as we have seen, remain unchanged, his right to become a purchaser would prove useless, and he might as well have had no sale at all. The provision permitting him to become a bidder is for the benefit of the pledgee, to permit him, if he so desires, to acquire the bonds at a price as high or higher than anyone else will pay at a fairly conducted public sale. He therefore acquires them absolutely, with the right to sell them again when opportunity offers, *with no more liability to account for the proceeds of such subsequent sale than he would have right to claim of the pledgor an accounting for his loss, in case he bid in the bonds at fifty, and was forced to resell them at twenty-five.*

To whittle down this title to a mere right to enforce the bonds for the amount of the original debt is equivalent to disregarding the pledge of the bonds and substituting for them as security a mortgage which it will require at least two years to foreclose in a distant foreign jurisdiction. Plainly, the New York trust company would not have accepted such a mortgage as security for its four months' loan. The consideration for that loan was Moore's guarantee of immediate payment upon maturity, and a deposit of collaterals which could be sold and realized upon at once in case of default.

A decision to the effect that a pledgee of corporate bonds to secure a corporate debt cannot foreclose the same by sale of the bonds in the same manner as a pledge of any other bonds or securities would simply inhibit the borrowing of money upon the collateral usually most convenient for a borrowing corporation to give, namely, its own securities.

Appellants' Authorities on This Point.

The appellant trustees, whose exhaustive search of the authorities is evidenced by their whole brief, have been able to find and cite only two cases which they claim in any degree support their contention on this point.

One of these cases (*Peacock vs. Phillips*, 93 N. E. 415), though of very doubtful soundness, expressly limits the doctrine which it enunciates to personal promissory notes, (which it seems to presume are not intended to be thrown upon the market, but rather to be held and collected when due) and expressly distinguishes and exempts from its doctrine corporate bonds, saying:

“Appellant relies upon a decision relating to collateral of that kind (corporate bonds) * * * Bonds of that kind are issued for the purpose of raising funds for the corporation and are intended to be thrown upon the market and to pass from hand to hand. The mortgage or trust deed secures the holders of the bonds, and they can be enforced by such holders for the full face value, regardless of equities. To permit equitable defenses to be interposed would practically destroy such methods of raising money, and the corporation is properly estopped to deny its liability” (citing authorities).

The *Peacock* case is largely based on an Illinois statute under which notes and mortgages are held non-assignable, and holds that a note and mortgage, taken as collateral security for a smaller note of the same maker and bid in by a purchaser having knowledge of the facts, cannot be enforced for a greater amount than that due on the original note.

Peacock vs. Phillips being thus eliminated, the only remaining case cited as supporting appellants’

doctrine is *Knickerbocker Trust Co. vs. Penacook Mfg. Co.*, 100 Fed. 814. This is a decision by Aldrich, District Judge, in the Circuit Court for the District of New Hampshire. It is very brief, cites no authorities, and contains no discussion of the principles involved, and, standing as an isolated and unconsidered ruling, at variance with universal practice and the authority of the higher courts on a transaction which is constantly occurring, seems entitled to but little weight.

Authorities Fully Sustain Title of Pledgee.

As against the solitary decision of a district judge in New Hampshire (a state famous for its peculiar local doctrines, at variance with the weight of authority over the country), we have the well established and uniform business practice permitting the pledging and sale of bonds issued by the corporation which pledges them, the same as any other securities, two decisions of the Circuit Court of Appeals for the Sixth Circuit, several decisions of Circuit Courts, including one in the Ninth Circuit, and decisions of the highest courts of a number of the states:

Farmers' Loan & Trust Co. vs. Toledo & S. H. R. Co., C. C. A. 6th Circuit; 54 Fed. 759.

Gilchrist Transportation Co. vs. Phoenix Ins. Co., C. C. A., 6th Circuit; 170 Fed. 279.

Atlantic Trust Co. vs. Woodbridge Canal & Irrigation Co. (Circuit Court, Northern District of California), 85 Fed. 975.

Fidelity Insurance Company vs. Roanoke Iron Co., 81 Fed. 439.

Chouteau v. Allen. 70 Mo. 290.

Wheelwright vs. St. Louis N. O. & O. C. T. Co., 56 Fed. 164.

In re Woods, 52 Maryland, 520.

Jerome v. McCarter, 94 U.S. 734. 24 L.Ed. 136.

In *Farmers' Loan & Trust Co. vs. Toledo & S. H. R. Co.*, C. C. A., 6th Circuit, 54 Fed. 759, the court, composed of Jackson and Taft, Circuit Judges, and Hammond, District Judge, holds, in a suit for the foreclosure of a railway bond mortgage, that bonds pledged by the railroad company as collateral security for a debt and put up at public sale and bid in by the pledgee on foreclosure of pledge, should be allowed in their full amount, though bid in for a very small sum, saying:

"The securities having been regularly issued and hypothecated as collateral for a debt the company was authorized to contract, and thereafter lawfully sold under the terms of the pledge upon proper notice, * * * we think the court below was in error in not allowing the decree of foreclosure to go for the full amount of 210 bonds and unpaid coupons thereto attached."

The court in this case puts its decision both on the ground that the transaction was valid on its face, and that it was not open to attack by other creditors of the company. If, as appellants contend, such a pledge is bad in law and cannot be foreclosed by any procedure so as to have the effect of increasing the claim of the original pledgee and permitting him to prove the bonds as an independent indebtedness as against the issuing company and its other creditors, then the title of the bank to these bonds would have been held still to be that of pledgee only, and they would have been allowed in the amount of \$20,000.00 instead of \$210,000.00. *The situation was precisely the same as in the case of Knickerbocker Trust Co. vs. Penacook Mfg. Co.*, appellants' sole reliance, in which other creditors intervened and there is no showing that the foreclosure was ever contested by the pledgor company.

In *Gilchrist Transportation Co. vs. Phoenix Ins. Co.*, C. C. A., 6th Circuit, 170 Fed. 279, the court considers an objection that a pledge of mortgage bonds to secure a lesser debt of the company issuing the bonds does not constitute a present incumbrance under the mortgage, the appellant contending that the indebtedness could not be thus in-

creased or multiplied. The court, speaking by Severens, C. J., says (p. 283):

“The last ground taken is that ‘the pledge by plaintiff in error of its bonds, in order to secure other obligations than those evidenced by the bonds which the mortgage was to secure, did not create a present incumbrance under the bonds and mortgage and did not forfeit the policy.’ This contention is equally hopeless. It is doubtless true that a mere additional promise by a debtor to pay his own debt is a vain thing. But not so if the additional promise to pay is itself secured by some new security. In that case the new promise may be used as a link to connect the new security to the old debt. However, there is no need of circuitry. *It is now well settled that a corporation may lawfully issue to a creditor its bonds secured by mortgage in pledge for the payment of another of its obligations.*”

In *Atlantic Trust Co. vs. Woodbridge Canal & Irr. Co.* (Circuit Court, N. D. Cal.), 86 Fed. 975, the court, by Morrow, C. J., in a foreclosure action, holds that bonds pledged to secure a lesser obligation of the company issuing the bonds and subsequently foreclosed by sale at public auction, in accordance with the terms of the pledge, and bought in by the pledgee, should be allowed in their full amount, the court saying:

“These bonds had been pledged to the intervenors (Buell & Co.) as security for certain materials furnished to the defendant corporation. I held that the intervenors were entitled to be paid the amount pledged on the bonds. *It is now claimed,*

however, that with respect to the bonds held by Buell & Co., one of the intervenors, the full face value of the bonds should be allowed to them, as they were sold at public auction, in accordance with the terms of the pledge, and were bought in by Buell & Co. Without entering into a discussion of the question, it may be said that Buell & Co., having bought in the bonds held by them as pledge security, are entitled, under the decision of the Supreme Court in *Wade vs. Railroad Co.*, 149 U. S. 327, 13 Sup. Ct. 892, to the full face value of the bonds. See also, *Farmers' Loan & Trust Co. vs. Toledo & S. H. R. Co.*, 4 C. C. A. 561, 54 Fed. 759, 774; *Wheelwright vs. Transportation Co.*, 56 Fed. 164. Therefore, so far as the bonds held by Buell & Co., and bought in by them, are concerned, they are entitled to be paid their par value of \$1,000 each, provided the residue of the proceeds of sale, after the payment of preferential claims, is sufficient to pay in full all of the bonds now presented."

Fidelity Insurance Co. vs. Roanoke Iron Co., 81 Fed. 439, concerns \$12,000 par value of bonds of the Iron Company, pledged to secure its note for \$5,000. (See p. 449.)

Wheelwright vs. St. Louis N. O. & O. C. T. Co., 56 Fed. 164, concerns bonds of defendant company, pledged to secure the company's note.

Were it necessary a distinction might well be made between pledges of corporate mortgage bonds and pledges of mere additional promissory notes of the pledgor, the former being issued and put upon the market for the very purpose of circulating

from hand to hand and furnishing a ready means of liquidation and sale of claims against the issuing company, and the latter being perhaps primarily intended to be held by the payee until maturity. But there is little necessity for making this distinction, since the question as to pledges of additional collateral notes of the pledgee was early set at rest by the leading case of *In re Woods*, (1879) 52 Md. 520. This was a case arising in the winding up of the estate of an insolvent debtor. As stated by counsel for the trustee at the outset of the report (p. 521): "The principal question in this case is * * * whether a debtor can give his own notes, not merely as the *evidence* of his indebtedness, but as *collateral security* for it; or whether a simple contract creditor, holding notes of his debtor of the face value of \$100,000, for instance, but upon which he has advanced to his debtor only \$50,000, stands in any better position than if the notes only represented the \$50,000 on their face."

The pledged notes were made by and payable to the order of the pledgors and indorsed by them to the pledgee under a pledge agreement permitting the pledgee to sell the securities at any time, at public or private sale, without notice, and to become a purchaser at such sale.

The court says:

“The contingency of a sale is expressly provided for, and its effects must have been within the contemplation of the parties when the contracts were made. Are they then valid and lawful contracts? In answer to this question I must say I am unable to perceive upon what ground they can be successfully assailed. * * * But it is said the giving of these notes was a mere increase or duplication of the debt due by the firm to the Garretts, and they cannot be used or considered as collateral security therefor. * * * It is true the effect of carrying out these contracts by a sale of the notes was to increase the *general indebtedness of* the firm, but it did not increase the debt then due the Garretts for which the notes were pledged as security. But this increase of general indebtedness is exactly what the contracts contemplated, and what the parties intended in case a sale was made, so that the question comes back at last to the validity of the contracts in this respect. Now, if instead of giving these notes, in the form in which they were drawn, to the Garretts as collateral security, the firm had placed them in the hands of a broker, for sale, and he had sold them to the same parties, and for the same price the Garretts obtained for them, and the firm had received the proceeds and applied them to this debt, exactly the same result would have followed. There would have been the same increase of the general indebtedness of the firm and the same diminution of the Garrett debt, which was effected by the sale under the contract, and in the case supposed it will hardly be contended that the purchasers would not have had a valid claim against the firm for the full amount of the notes. Such notes are constantly sold on the streets in all the large commercial cities of the country. * * * With this right of sale, the notes became, in the

hands of the Garretts, a valuable and reliable security for the debts due to them under the letters of credit, and I am unable to discover any ground on which the firm or their other creditors can impeach the transactions. The authorities cited in support of opposite conclusions, while differing in other respects, appear to me to be clearly distinguishable from the present case in that there is here an express power of sale, which the parties intended, if carried into effect, should result in the consequences which have followed, and which has been actually executed."

II.

Concerning appellants' argument that, on the evidence presented, both the Referee and the District Court were wrong in their respective findings that our sale of the bonds in New York was made honestly, fairly, and without fraudulent intent, and that (a) from the evidence of the notice given, and (b) from the alleged inadequacy of the price at which the bonds were bid in, this court should reverse this finding in which the Referee and District Judge both concur, and should find that the sale of the bonds in New York was conceived and carried out for the fraudulent purpose of preventing the public from bidding upon the pledged bonds, and in order, by a secret and colorable sale, to increase the Western Steel Corporations' indebtedness.

No Issue of Fraud or Bad Faith Has Been Raised.

The trustees' objections to the claims of Metropolitan Trust Company, though lengthy and carefully drawn by able counsel after several months' investigation of the affairs of the bankrupt company, make no charge of fraud or bad faith, and nowhere impugn the good faith of the Trust Company in foreclosing its lien upon the pledged collateral. (Transcript, pp. 1 to 7.) The trustees alleged their legal conclusion that the notice of the sale was insufficient and that the price at which the bonds were bid in was inadequate, but did not allege bad faith on the part of the Trust Company. Upon the objections coming on for hearing before the Referee, then, there was no issue of fraud before the court, and the good faith of the transaction was not involved in the objections to the Trust Company's claim. The matter being submitted upon all the evidence now before this court, and on all files and records, there was no evidence of fraud, collusion, or bad faith, unless that inference is to be drawn from the simple fact that the Trust Company sold the bonds in accordance with the universal usage, upon the customary notice, and in conformity with the terms of the contract of pledge.

Foreclosure of the pledge by a public sale in accordance with contract being shown, the burden of proof is on the trustees in bankruptcy to allege and prove fraud.

Hiscock vs. Varick Bank, 206 U. S. 28; 51 Law Ed. 945.

It is usually held, too, that a finding of fact in which the Referee and District Judge substantially concur will be accepted as final by this court, and the evidence will not be reviewed.

Smith vs. National Suffolk Bank, 127 Fed. 286.

Collier on Bankruptcy (9th Ed.) p. 547.

Naylon vs. Christiansen Harness Mfg. Co. (C. C. A., 6th Circuit), 158 Fed. 290.

In re Sweeney, 168 Fed. 612.

In 2 *Loveland on Bankruptcy*, 4th Ed., Sec. 847, the rule is stated as follows:

“If the findings of fact of a referee and a judge are the same, the facts will not usually be inquired into by the appellate court.”

We shall discuss under our next heading (III) the sufficiency and reasonableness of the notice given. It is plain that no fraudulent intent can be implied from a notice which all the evidence in the case shows to be that which is usual and customary.

The Western Steel Corporation and its properties were *known*, but not thought well of in New York (Transcript, p. 23), and that low opinion subsequent events have justified.

The personal notice from the Trust Company to Western Steel Corporation (Transcript p. 18) is also in itself sufficient to negative a fraudulent intent on the part of the Trust Company in calling the sale.

Even had no advertisement or public notice been given, the sale would have been perfectly valid, since it occurred at a regular weekly auction of unlisted financial securities (Transcript, p. 47), largely attended by buyers. (Transcript, p. 21.) The character of these weekly sales of Adrian H. Muller & Son is illustrated in the cases of *Farmers' National Bank of Annapolis vs. Venner* (Supreme Judicial Court of Massachusetts), 78 N. E. 540, and *White, Rec'r, vs. City of Rahway*, 16 Fed. 833. In the *Venner* case the court comments on the fact that it was conceded that these were proper auctioneers, and that their sales room was a proper place for the day auction.

In the *Rahway case* (1882), Muller & Son are referred to as "the well known stock auctioneers," and a sale at their regular Wednesday auction of

stocks and bonds is confirmed. It is shown, too, and not contradicted, that these are the sales rooms designated by the Appellate Division of the Supreme Court of New York, and that the auctioneers who sold the pledged bonds are the only auctioneers doing any considerable business there. (Transcript, pp. 57-58.)

How can counsel ask the court to find fraudulent intent from the mere putting up of bonds at what appears to be the principal weekly auction sales of such securities, held in the metropolis and financial center of this hemisphere, and upon notice to the pledgor and to the principal bond buyers and moneyed men of that financial district?

Bidding in of Bonds at \$25,000 Not a Fraud on Pledgor.

To the claim of the trustees that the bidding in of the bonds for \$25,000 was a fraud on Western Steel Corporation, or was evidence of fraudulent intent or bad faith, we answer:

1. That \$25,000 was a fair price, and that there is no evidence that at the time they were sold the bonds were worth more.

2. That even if they were worth more, there is no evidence that the pledgee knew they were worth more.

3. That under the contract of pledge the test of public sale in the New York market was to be conclusive and final, and no duty was imposed upon the pledgee to incur the expense and delay incident to such an inquiry into the details of the properties as would be necessary in order to determine the probable intrinsic value of the bonds.

1. **Record contains no evidence that bonds at time of sale had a cash value in excess of \$25,000.**

If it were a fact it would have been very easy for the trustees to have shown that people in New York, Seattle, British Columbia, or elsewhere stood ready to pay more than \$25,000 for the bonds, or to show by the testimony of New York bankers and brokers that by reasonable efforts a better price could have been obtained for them; but there is no such testimony. None could be had. The only testimony which it is even argued justifies a finding of a higher value for the bonds is evidence of the appraisal in bankruptcy of the entire assets of the company, nearly half a year later. There is no evidence that the value of the properties (admittedly of a highly speculative character) had not greatly

increased since the previous summer, and, in fact, it appears from the appraisal that the principal item covered by the mortgage was appraised at *33 1/4% more than cost*. (Transcript, pp. 23, 34.)

Bearing in mind that the appraisal is merely an expression of opinion by men having no previous acquaintance with the properties, who find them enormously overcapitalized by the defunct company, and make their estimates largely on an assumption of the correctness of the bankrupt's cruises and engineering reports (Transcript, pp. 29, 43), let us examine it in detail.

Taking the first item of the appraisal, *power plant and equipment* (Transcript, p. 30), and comparing it with the first item of the supplemental or corrected appraisal (Transcript, p. 37), it is seen that the greater part of the valuation is in buildings, machinery and equipment, and *that the buildings are not valued separately from the machinery and equipment, which latter are not covered by the mortgage securing the bonds*. (Transcript, p. 22.)

The court may perhaps take judicial notice that the principal part of the value of a steel rolling mill plant lies, not in the mere wood skeleton buildings, but in machinery, which under Washington decisions is personalty, not covered by the mortgage.

Zimmermann vs. Bosse (1910), 60 Washington 556.

Sherrick vs. Cotter, 28 Washington 25.

Neufelder vs. Third Street Ry., 23 Washington 470.

The only items in the Irondale valuation which can be determined to be covered by the mortgage are as follows:

Twenty-acre plant site valued at.....	\$ 10,000
Twenty acres filled tide lands valued at (Transcript, p. 37)	5,000
With a contingent item for lots in which the bankrupt's title was uncertain, amounting to (Transcript, p. 38).....	2,500
And other scattered realty appraised at.....	3,500
Next we find 150 acres in Snohomish County valued at	1,000
And property in Skagit County at.....	1,500
We find a very high valuation placed on mineral claims in British Columbia, which the appraisers value at.....	25,000

As to these the appraisers say: "If there is blocked out on this property about 1,500,000 tons of ore and a probability of 5,000,000 tons more, which would cost \$0.70 per ton at the tide water, as per report of W. Price, M. E., then we appraise this property at \$25,000 (Transcript, p. 32.)

Surely, this offhand estimate, based purely on hearsay and on a contingency, is not evidence on which the good faith of a previous sale of bonds can be impugned!

Next we find a silica prospect, appraised
(Transcript, p. 33) at \$250, and on
page 41 at 1,000

The above discrepancy well illustrates
the speculative nature of the properties and
the uncertainty of any value which may be
attributed to them.

Next we find an iron mine in Nevada.
As to this the appraisers say: "*In the ab-
sence of any other information concerning
this property other than one mining report,
we are compelled to base our valuation upon
a consideration of the agreed purchase
price, and in connection therewith the prob-
ability of a cash sale within a reasonably
short time.*" "*\$1,000 only has been paid on
account* (Transcript, p. 33)."

The appraisers then estimate a clear title to
this as having a cash value of..... 25,000

The bankrupt company never had a
clear title, however, only \$1,000 having
been paid on the speculation. (Transcript,
p. 33.) The original owners claimed a
vendor's lien thereon in the sum of approxi-
mately \$100,000, proceedings for the fore-
closure of which are now under way.
(Agreed Statement of Facts, Transcript, p.
22.) This item must therefore be eliminated.

Next we find another mineral property
valued on hearsay (Transcript, pp. 33,
34, 42) at 2,500

The next asset, though many thousands
of dollars have been expended upon it, is
reported as lapsed and worthless. (Tran-
script, pp. 34, 42.)

Finally we find certain naked options upon undeveloped coal and timber properties on one of the Queen Charlotte Islands, in British Columbia, valued at

(Transcript, p. 34) 187,000

And subsequently (Transcript, p. 43)
at \$200,000.

Let us see what this item really represents. It is a seven-eighths ownership of the stock of a Canadian corporation called Western Coal & Iron Corporation, Ltd. This corporation was not the owner of the lands, but had a contract to acquire them by option under escrows in British Columbia. We quote from the agreed statement of facts (Transcript, p. 23):

"At the time of the sale of the securities in New York and of the bankruptcy in Seattle, there was due and payable upon these lands under pain of forfeiture of the escrows, \$250,000.00, and there had been paid in the past approximately \$150,000.00. The escrows call for annual payments of \$50,000.00, with six per cent per annum interest payable semi-annually upon the whole deferred principal, and provide for absolute forfeiture of all past payments and cancellation of the option in case of twenty days' default in payment of principal or interest. * * * (And on p. 24.) The right of James A. Moore and Western Steel Corporation to the shares of stock in Western Coal & Iron Corporation, Ltd., above described were, however, at the time of the sale of the bonds in New York City, and at the time of the bankruptcy proceedings, in litigation, which is still pending and undetermined.

“At the time of the sale of the bonds in New York and also at the time of the bankruptcy in Seattle, the Graham Island tract was known to contain timber, and it was also supposed to contain a deposit of coal. *The latter, however, had never been explored, and its value was hypothetic.* The timber on the property, according to then available reports, was worth *a good share of the purchase price remaining unpaid.*”

The appraisers say: “*A great deal of expensive development work is required before it would be possible to realize on these coal properties.*” (Transcript, p. 34.)

Here is a speculative option in the most over-boomed section of America, at the height, or rather *on the decline* of a period of speculation and vast inflation of values in British Columbia, and on this *only three-eighths of the purchase price has been paid*, the thread of title being liable to be instantly cut off upon twenty days' default in payment of principal or interest. (Transcript, p. 23.)

Is this the kind of property which the court will require one of our great banks, upon whose solvency the safety and prosperity of the country depends, to bid up and speculate upon, when all others in New York are afraid to risk any money on it, and the company that has pledged it is unable upon thirty days' notice to find a single bidder who offers more

than the Trust Company bid? Manifestly it is more of a liability than an asset.

The total of the highest appraised valuations of the property included in the mortgage (excepting the buildings at Irondale, which are not separately appraised), leaving out of account these Graham Island options and the Nevada property, upon which title had failed, but including the Quatsino Sound mining claims at a hearsay, contingent, and wholly speculative valuation of \$25,000, is \$52,000.

As against this, in estimating the value of the bonds secured by mortgage upon the properties, we must deduct the probable cost of foreclosure on these vast and scattered holdings, and a very heavy allowance for depreciation, and for such underlying liens as under the laws of the State of Washington take precedence of the mortgage debt. To this class belong *laborers' liens*, which, upon a plant of the character of that at Irondale, "which was then, and had ever since its construction, and for more than a year, been *operated intermittently and unsuccessfully*" (Transcript, p. 22), might well be expected to amount (as in fact they did) to between \$25,000 and \$50,000 (Transcript, p. 24).

Indeed a purchaser of the bonds could have no security that liens on such a plant would not amount

to \$100,000 before foreclosure could be had. The law applicable to these liens, Remington & Ballinger's Code, Section 1149, is as follows:

“Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, shall have a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corporation, which is used in the operating of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien.” (L. '97, p. 55, Sec. 1.)

Quatsino Sound

The ~~Graham Island~~ claims, too, were subject to a lien of \$2,500 (Transcript, pp. 24, 25).

Manifestly the purchase of these bonds at \$25,000 was a risky investment. Their purchase at a higher price would have been still more risky. The appraisal furnishes little evidence that the mortgaged properties themselves were salable for more than \$25,000, and no evidence that the bonds, as bonds, were worth more, having only a lien on the property subject to prior incumbrances and the expense and delay of foreclosure.

The bonds brought all that could have been expected under the circumstances.

At the sale of the bonds in New York there were other bidders, and the Trust Company was the highest and best bidder. (Agreed Statement of Facts, Transcript, p. 20). At the time of the sale the Western Steel Corporation had had thirty days' notice, and it may be presumed that among the other bidders were such persons as it had been able to interest in the bonds. In the nature of things, on all the evidence disclosed in this record, why should anyone pay more for them? The Graham Island and other outlying assets were wholly undeveloped and unproductive, and depended for their development and value on the steel plant at Iron-ore. (Transcript, p. 22.) The steel plant had never been operated successfully. We quote from the Agreed Statement of Facts (Transcript, pp. 22, 23):

"This was then an experimental industry on Puget Sound, no other steel plant being or having been in operation west of the Rocky Mountains, and the suitability of the plant's location, the adequacy and suitability of its construction and equipment, and the possibility of its profitable operation were then in doubt and dispute both in the commercial world generally and in New York, as well as in Seattle and in the State of Washington."

Furthermore *the order of the District Court shows that its decision upon the value of the property was rendered in part upon the several bids received by the trustees in bankruptcy for the various assets offered by them for sale.* (Transcript, p. 70.)

The agreed statement of facts shows that bids other than those of the Metropolitan Trust Company were received only on a *trifling portion* of the property, (Transcript, p. 27), and the Graham Island asset being appraised as the largest item among the Western Steel assets, we may, without departing from the record now before the court, state the fact that, though the sale conducted by the appellant trustees in Seattle was upon what they themselves concede to have been ample and sufficient notice, which was published a great number of times in numerous newspapers (Transcript, p. 27) at an expense probably of upwards of \$1,000 (the expense of publication in two of the five newspapers in which the notice was published is shown to have been about \$500), (Transcript, p. 61), *yet no bid but our own on behalf of Metropolitan Trust Company was received upon the Graham Island asset!*

How ridiculous is the position of the appellant trustees, who contend that the sale in New York was

insufficiently advertised and that the price there bid for the privilege of foreclosing upon these assets was inadequate, and yet are forced to admit that after they had given what they considered the most ample notice, they were unable to get one single cash bid for all or any substantial portion of the pledged assets! (Agreed Statement of Facts, Transcript, p. 27.)

2. Evidence of guilty knowledge necessary to a finding of fraud.

While the evidence seems to us conclusive that the price bid for the bonds was adequate and reasonable, still, even if we were to assume the evidence to show that it was unreasonable and inadequate, there would yet be lacking an essential element of fraud, namely, guilty knowledge and intent. A pledgee does not warrant that he will get the highest possible price. *The Western Steel Corporation, in pledging its bonds, refused to represent them as having any particular value whatever, leaving the estimated value of the collateral blank in the contract of pledge.* (Transcript, p. 50.) There is not a scrap of evidence that at the time of the sale the Trust Company had knowledge or notice, or could have discovered that the bonds ought to bring a greater

price, and, on the contrary, it appears by the agreed statement of facts, as already noted, that the bonds were of a so-called "wild cat" character, having never been listed as standard securities (Transcript, p. 20), and that, though descriptions of the mineral properties were available, their values were wholly uncertain (Transcript, p. 22), and the steel plant, which formed the nucleus of the property, was unsuccessful, and the possibility of its profitable operation was then in doubt and dispute, both in the commercial world generally and in New York, as well as in Seattle. Of the Graham Island option, the principal asset, according to the appraisal, it is admitted in the agreed statement of facts that it "had never been explored and its value was hypothetical." This statement of facts wholly negatives the element of knowledge that the price bid was inadequate, which is essential to the making out of a case of fraud in the foreclosure of the pledge.

3. Public sale in the New York market was, by the intent of the parties as disclosed in the contract of pledge, to be the final test of value.

On this point again we recur to the intention of the parties as shown in the contract. Having already discussed this under "I" and heretofore un-

der "II," we will not dwell upon it. There can be no fraud in the carrying out of a contract according to its terms and the original intention of the parties.

The pledgee was a bank. Its solvency was dependent upon its being able to liquidate its collateral promptly upon default in payment of pledgors' obligations. It was the intention of the parties that the pledgee should have the right to sell at once at public sale on the New York market, and realize whatever the collateral would bring, without being obliged to await a more favorable market, or speculate upon a possible excess of intrinsic value in each of its thousands of blocks of stocks and bonds, above the market value as fixed by the law of supply and demand. This is plain from the contract, and necessarily follows from a consideration of the circumstances under which the contract was made. Any other rule would be disastrous to business and finance, and in times of depression would mean the wholesale insolvency of banking institutions and the most widespread loss to depositors and the public.

A frequenter of the stock market daily hears it said of this or that stock or bond, that the company's assets give it an intrinsic value of double the market quotation, and this not infrequently is the case. It would upset all business to require pledgees of stocks

and bonds to investigate the intrinsic worth of pledged securities as indicated by the apparent value of corporation assets, and to hold the securities, unless the price bid for them equals their estimated theoretic value. Intrinsic value is dependent upon considerations of validity of title, secret incumbrances, continuity or faults in mineral lodes, prospects of continued successful operation, the personal equation, and innumerable other factors which it would be impossible for a pledgee to estimate or properly take into consideration.

There must be some final liquidation of the security, and test of its value. The parties agree that this shall be by public sale at the place of the pledge, and upon such sale, with notice to the pledgor to protect his interest, there is no more reason for overturning the sale on account of the collateral having brought a low price, than for overturning judicial sales upon foreclosure, at which it is the rule rather than the exception that the property is bid in reluctantly by the creditor at a price much less than its supposed intrinsic value. If refusal to bid in pledged property at its full estimated intrinsic value were held fraud, all foreclosure sales would be voidable, and by reason of uncertainty in the title conveyed, it would become practically impossible to

secure any bona fide bidder at sales of pledged collateral.

Referee and District Court Both Find Sale Was in Good Faith.

The Referee finds (Transcript, p. 9) that the foreclosure of the pledge in the bidding in of the bonds by the Trust Company was without any fraudulent intent upon its part. The District Court makes the same finding, intimating that in the pleadings and in the argument of the matter before the District Court it was conceded that "no fraud was practiced or existed." (Transcript, p. 68.)

This is the record on which the appellants now ask your Honors to find actual fraud on the part of Metropolitan Trust Company, voiding and nullifying the whole foreclosure procedure!

No Authorities Support Appellants' Contention That the Facts in This Case Evidence Legal Fraud.

Muhlenberg vs. Tacoma, 25 Wash. 36, is a case in which foreclosure of the pledge was had after the insolvency of the pledgor and when the pledgee knew that the pledgor and its receiver were helpless

to protect the collateral, and that the pledged warrants were absolutely valueless in the market. The president of the pledgee bank testified that the foreclosure sale was not held for the purpose of realizing on the security, but in order *to get title to the property*. (We take the italics from the court's opinion.) This is the ground on which the foreclosure sale was set aside, the court expressly saying:

“The object of the sale of a pledge contemplated by the law was to realize thereon in payment of the debt, and, if conducted fairly under the power given to the pledgee, it will not be set aside because the highest market price was not realized.”

The court then distinguishes cases holding valid foreclosures under unfavorable circumstances at which inadequate prices were realized, saying:

“This case is far from supporting the proposition that the pledgee can sell when there is no market, and when he knows the thing offered for sale, *by reason of unforeseen circumstances, is like so much waste paper, and has lost all its market value and that such circumstances could not have been in contemplation of the parties when the pledge was made*. Under such conditions it was the duty of the pledgee to take action or at least he should have requested the pledgor to take the necessary steps to establish the validity of the pledge. (Meaning to establish the validity and value of the pledged securities which had been dishonored). *If the pledgor, on such request, should refuse to act, then a sale might be made* for the refusal of the pledgor to act would be equivalent to an abandonment of the property.

In *Franklin National Bank vs. Newcombe*, 37 N. Y. Supp., 271, the court simply held that the creditor had a right to collect when his claim became due, and that the debtor could not compel him to wait because it was inconvenient to pay, and a bad time to realize on his assets. The stock and bonds in that case *had some market value*, and the pledgee knew he could realize something on them at the sale. The presumptions are all the other way in the case at bar. * * * The unfairness and inequitableness of this case consisted in attempting a sale when the pledgee knew * * * that suits were pending to prove the pledged property of a value far in excess of the amount of the debt for which they were pledged. * * * There can be no pretense that there was any intention of realizing money by reason of this sale."

The *Muhlenberg* case is also based in part on Judge Ballinger's decision in *Morris vs. East Side Ry. Co.*, 95 Fed. 13, since reversed by this Court in *Morris & Whitehead vs. East Side Ry. Co.*, 104 Fed. 409, at 415.

In the *Morris & Whitehead* case, which appellants also rely on, this court after quoting the very language of Judge Ballinger's opinion which appellants print in their brief, says (p. 415):

"We are unable to concur in these views of the court below."

It is thus seen that neither of these cases constitute any authority for appellants' claim.

Perkins vs. Applegate, 85 S. W., 723, the only other case cited by them on this point, is a Kentucky Court of Appeals case, "not to be officially reported." While there is some vague language referring to the old common law duties of pledgees, the case is decided on the ground that the pledgor's representative appeared at the time and place of sale and inquired of the auctioneer whether the sale was to occur, and was informed "that there would be no sale; that the stock had been withdrawn," and that the pretended sale was made secretly and not in public, the court saying:

"This leaves Mr. Irwin making a sale with no one present, and acting as the agent of Mr. Perkins as trustee in selling, and as the agent of Perkins individually in buying. This was the same as if Perkins, as trustee, had sold to himself individually, with no one else present."

The court very properly holds that this was not a proper sale.

The three cases above digested are the only ones which appellants cite upon this point.

The authorities unanimously hold that such procedure as the Trust Company pursued in this case is entirely fair, and furnishes no evidence of fraud, and that it effectually forecloses the pledge.

Morris & Whitehead vs. East Side Ry., 104 Fed. 409, at 415,

Fidelity Insurance Co. vs. Roanoke Iron Co., 81 Fed. 439,

Farmers' National Bank of Annapolis vs. Venner, (Mass.) 78 N. E. 540,

Farmers' Loan & Trust Co. vs. Toledo & H. R. Co., 54 Fed. 759,

Wheelwright vs. St. Louis M. O. & O. C. T. Co., 56 Fed. 164.

III.

Appellants claim that the public notice was unreasonably short and the sale therefore invalid, because not a public sale.

We have very little comment to make on the third point on which appellants attack the order and findings of the District Court. The only evidence in the case shows that the notice given was such as is usual and customary in the sale of similar securities.

"But," the trustees exclaim, "these were unlisted and unknown securities."

They were in fact unlisted, but they were not unknown.

The trouble with them was that they were known, but not favorably known.

There is not a line of evidence that the fullest information regarding the properties covered by the mortgage securing the bonds was not readily available in New York, or that the bonds and the properties secured thereby were not as well known in New York as in Seattle, or anywhere else.

On the contrary, it affirmatively appears that the Western Steel assets and prospects were a subject of public interest and comment in the commercial world of New York, and that they were discredited by the speculative and experimental character of the undertaking (Transcript, p. 23). The most that can be said from the record and agreed statement of fact as to lack of information regarding the properties is that the general public information regarding the value of the bonds and the value of the properties securing the same was not "definite," and the same is true of any "wildeat" mining stock, representing properties like those of Western Steel Corporation, which consisted principally of *undeveloped mineral prospects*. That such stocks and bonds are not pledgable or when pledged cannot be sold at public sale like any other stocks or bonds, is a proposition wholly novel, and not supported, so far as we know, by a single adjudicated case.

The Trust Company had not furnished the collateral: It had taken what the pledgor offered, and if this was unpopular or of little value because of speculative character of the assets securing it, the pledgee was not responsible therefor. The bonds were known and had some market value in New York: nobody denies that. The Western Steel Corporation pledged them for the express purpose of their being sold at public sale "at any brokers' board," in case of default in payment of the note (Transcript, p. 52).

The trustees, standing in the shoes of the bankrupt, do not show any exceptional situation requiring delay in the sale of the bonds, or any change for the worse, rendering them unsalable or less salable, between the time they were pledged and the time they were sold.

Mr. Ives, in his testimony (Transcript, p. 47) says:

"For many years a great majority of the public auction sales of stocks and bonds, such as the said bonds of the Western Steel Corporation, which are not dealt in on New York Stock Exchange, nor sold on the curb, have been conducted by said Adrian H. Muller & Son as auctioneers."

And (p. 49) "The sale that was had of the said bonds was had in the same way in which public auction sales of such bonds are customarily and regularly had." Mr. McCormack testifies, (p. 56),

"In recent years we have conducted the great majority of the public auction sales of stocks and bonds in the city of New York. Every Wednesday, at 12:30 o'clock, we conduct such a public auction sale of stocks and bonds at the aforesaid Exchange Sales Rooms. Our custom is, preliminary to the sale, to send to practically all the important banking and financial corporations, firms and individuals in the financial district of New York City a list of the securities to be sold, and to advertise that list in the "New York Evening Post" of the day before the sale and in the "New York Times" and the "Wall Street Journal" of the day of the sale. These papers are selected because they are considered to be the best media for reaching those who would be likely to bid. * * * (p. 57). Upon the list for the sale on August 30, 1911, so sent to banking and financial corporations, firms and individuals and so advertised in the "New York Evening Post" on Tuesday, August 29th, and in the "New York Times" and "Wall Street Journal" on Wednesday, August 30th, were the bonds hereinbefore referred to. They formed one of twenty-four lots of different securities advertised for sale and sold on the said 30th day of August, 1911. * * * (p. 58). The methods pursued in connection with the aforesaid advertisement and sale of the bonds hereinbefore referred to were those which are customary. They were in all respects regular and the same as those pursued by us in connection with thousands of other lots of securities."

This testimony stands uncontradicted. There was no evidence offered of any different custom or usage. The trustees did not offer to show that longer advertising would have been more advantageous, and in the absence of testimony, it must

be presumed that the usual advertising is that which is found most advantageous and effective.

What Do the Trustees Show?

Now, if the trustees had really believed that this sale was insufficiently advertised, what would they have done? Of course, they would have produced evidence to show that the advertising given was less than is usual and customary, and that upon proper notice and advertising better bids could probably have been obtained. Is any such showing made here? Not by so much as a word of testimony. On the evidence there can be but one finding, and that is that the sale was conducted in every respect in accordance with custom and usage in the sale of unlisted stocks and bonds in the City of New York. Under the testimony in this case there is no issue on that point. It is not open to debate, and we wonder that, in the face of a record so conclusive able counsel for the trustees should continue to urge this objection.

The sale, as we have seen, was made on August 30, 1911. No objection was made and no steps were ever taken, and no proceedings brought by Western Steel Corporation, James A. Moore, or any other person, to attack or set aside the sale. The

question of the validity of the sale was raised for the first time in the bankruptcy proceedings commenced two months after the sale, and then only by way of objection to the Metropolitan Trust Company's claim, and not by any affirmative claim to the bonds or offer to redeem them.

We readily concede that the mere making of a sale in a public place is not conclusive, if through lack of notice, lack of attendance, unreasonable hour of sale, or other circumstances, there is no real publicity; but we think counsel for the trustees are in error in treating notice by public advertisement of any particular sale as the supreme test of publicity. Our opponents confuse the necessary requirements in the case of a sale in a small town, where there are no regular financial sales and no established market, and where particular notice is necessary in order to assemble even a half dozen possible bidders, with sales of securities in a great financial center where tens of thousands of men and institutions stand always ready to pick up all sorts of securities, if offered at a price which they believe to be advantageous, and where millions of dollars worth of stocks and bonds are daily and hourly sold on exchanges and on the curb, without any notice whatever, bringing always the market price, that

is to say, whatever the common judgment of the community estimates such securities to be worth.

This may be far more or far less than their intrinsic value. It is nevertheless their market price, and is all that a pledgee can be asked to secure. He is not bound to attempt to create a market by advertising and booming the securities. He is not bound to await a more favorable market or an increase in speculation in coal lands or iron deposits. He is not bound to await the determination of tariff schedules which may effect the marketability and value of a steel plant on the Pacific Coast. By the terms of the pledge the pledgee is authorized to do just what the pledgee did in this case, to offer the pledged securities in the financial market of New York and sell them for what they will bring, letting the purchaser assume all future risk as to their value, and take all chances as to whether their intrinsic worth is greater or less than the estimate which the financiers of New York put upon it, and all uncertainties as to future fluctuation. This is a contract right which the pledgee required, and the pledgor gave it him in consideration of a loan of \$600,000 of the pledgee's money, advanced on the faith of the agreement. It must be given full force and effect.

Our adversaries cite on this point *Tennant vs. Union Central Insurance Co.*, 112 S. W. 754, in which there was a pretended sale and purchase of the pledged property by the treasurer of the company *in the company's office in Cincinnati, upon no public notice whatever*. Such cases as well illustrate the kind of sale that is bad in law, as the record in this illustrates the kind of sale that has always been held valid.

The same may be said of *Foot vs. Utah Bank*, 54 Pac. 104, where stock was sold at the front door of the bank, without notice or advertisement of any kind, and without public attendance, and wantonly sacrificed. We have no dispute with such a decision.

Laclede National Bank vs. Richardson, 56 S. W. 1117, also cited by appellants, hinges on defective notice and on the fact that at the time of the sale the weather was so inclement that bidders could not attend, and that the sale was not held in accordance with the advertisement of sale, being held inside the courthouse when advertised to occur at the courthouse door.

Possibly appellants may contend that by reason of the mortgaged properties being widely scattered,

the notice should have been longer, in order to permit their examination. The suggestion is absurd, however, because no mere bidder, having no certainty of acquiring the property, could afford to go to the expense of such examination. A large part of the securities dealt in by New York financial institutions are based on distant properties, and the delay proposed would paralyze business. These properties, too, are practically inaccessible. *Even the appraisers in bankruptcy found it impossible to visit them.* (Transcript, p. 36.) The bonds and their interest were payable in New York, (Transcript, p. 59) and the company and its properties were known in New York and the subject of discussion and dispute there. (Transcript, p. 23). No doubt more reliable information regarding the value back of the bonds was obtainable in ten minutes on Wall Street than in months of travel among these wild and scattered properties.

IV.

Our Opponents' Claim That the Sale Was Bad Because of Inadequacy of Price.

Appellants' argument is that the bank was bound to "get the highest cash value out of the col-

laterals," and that if the bonds were sold for less than their "highest value," the sale is bad.

We have already commented on the evidence which, as we think, shows that the price bid for the bonds was equal to their fair cash value, and which certainly justifies the finding of the District Court that no "such inadequacy of price is shown as would shock the conscience." (Transcript, p. 68, pp. 28 to 37, *supra*.)

Upon the question of law as to whether, in the absence of fraud, inadequacy of price will invalidate a properly conducted public sale of pledged collaterals, we desire to comment but briefly, as the rule is well settled by an overwhelming weight of modern authority, including decisions of the Circuit Court of Appeals for this Circuit. Any other rule would, as we have heretofore pointed out, unsettle business and render it impracticable for banking institutions to loan upon pledged collateral.

The following authorities sustain the rule that inadequacy of price is not a ground for setting aside a public sale, made in accordance with the contract of pledge:

In re Mertens (C. C. A., 2d Circuit), 144
Fed. 818, 822.

Farmers' Loan & Trust Co. vs. Toledo (C. C. A., 6th Circuit), 54 Fed. 759.

Wheelwright vs. St. Louis N. O. & O. C. T. Co., 56 Fed. 164.

Morris vs. East Side Ry. Co. (C. C. A., 9th Circuit), 104 Fed. 409.

Farmers' National Bank of Annapolis vs. Venner, 78 N. E. 540.

Fidelity Insurance Co. vs. Roanoke Iron Co., 81 Fed. 439.

Chouteau vs. Allen, 70 Mo. 290.

White, Receiver, vs. City of Rahway, 16 Fed. 833.

Jones on Pledges and Collateral Securities (2d Ed.), Sections 735, 727.

Franklin National Bank vs. Newcombe, 37 N. Y. Sup. 271, affirmed in the New York Court of Appeals, 51 N. E. 1090.

In *In re Mertens* (C. C. A., 2d Circuit), 144 Fed. 818, Judge Wallace, delivering the opinion of the court, says (p. 821):

“* * * by the stipulation of such a pledge as this was, the pledgor, in effect * * * releases the pledgee from all the legal obligations which would ordinarily rest upon him in disposing of the property to satisfy his demand. The authorities sanction such contracts. In *Baker vs. Drake*, 66 N. Y. 518, 23 Am. Rep. 80, it was decided that the parties to a transaction, which creates the relation of pledgee and pledgor between them, may provide by contract for any manner of disposing of the pledge to satisfy any claim upon it, which is not in

contravention of a statute, against public policy, or fraudulent. In *Toplitz vs. Bauer*, 161 N. Y. 332, 55 N. E. 1059, the court said: "In recent times the rights of the parties to enter into a contract providing for a sale or disposition without notice have been recognized, and the disability of the pledgee to become a purchaser, it is said, may be removed by express stipulation of the parties." "

The court then quotes and approves the language used in the *Roanoke Iron Co.* case, *supra*, and continues (p. 822):

"It may happen that a pledgee will be unable to obtain from others the sum which he believes he may be able to realize from the property by purchasing it himself, and disposing of it when a favorable opportunity offers. * * *"

Farmers' Loan & Trust Co. vs. Toledo (C. C. A., 6th Circuit), 54 Fed. 759, is precisely on all fours with the case at bar. It appears that \$210,000 par value of first mortgage bonds of the Railroad Company were pledged as collateral security for a loan to the Railroad Company. The court says:

"The railroad company failed to make payment, and on the day designated, and at the place and time indicated in said notice, said bonds were sold at public auction, the sale having been also advertised in one or more of the daily newspapers of New York city, and were purchased by said bank at and for the sum of \$20,000, which amount it credited on the railroad company's note."

Judge Jackson, delivering the opinion of the court (in which Taft and Hammond, J. J., concur), says:

"The securities having been regularly issued and hypothecated as collateral for a debt the company was authorized to contract, and thereafter lawfully sold under the terms of the pledge, upon proper notice, even the maker of the paper could not impeach the purchaser's title thereto, and the right to recover the amount thereof, *without setting up and establishing fraud or breach of trust causing injury.* * * * We think the court below was in error in not allowing the decree of foreclosure to go for the full amount of 210 bonds and unpaid coupons thereto attached."

In *Wheelwright vs. St. Louis N. O. & O. C. T. Co.*, 56 Fed. 164, it is said:

"As to the foreclosure of the pledge, it seems to have been foreclosed in a manner strictly legal. The fact that at the sale under the foreclosure the bonds brought but little, there being no fraud shown, cannot impeach complainant's title."

In *Morris vs. East Side Ry. Co.* (C. C. A., 9th Circuit), 104 Fed. 409, this court considers a sale of railroad bonds on foreclosure of pledge at a price which the District Court held to be grossly and unconscionably inadequate, in view of the evidence of the earning capacity of the railroad. This court holds that there is no evidence of fraud, and that

the pledgor, at the sale, acquired a clear title to the bonds.

In *Jones on Pledges and Collateral Securities*, (2d Ed.), the general rule is stated as follows (Sec. 735):

“As regards the price obtained at a sale made under a power to sell without notice, the mere fact that the price obtained is less than the market price at the time does not alone make the pledgee liable for the difference. * * * A pledgee authorized to sell stocks and bonds pledged as collateral security at any brokers’ board, or at public or private sale without notice, *may sell after the maturity of the debt secured, without waiting for a favorable condition of the market.*”

See also Sec. 727, as follows:

“When a creditor has given proper notice of the sale of the collateral security, the debtor has no alternative but to redeem the security by paying the debt for which it was pledged, or to allow it to be sold. He cannot resist the creditor’s right to have the stock sold, on the ground that the sale could then be made only at a great sacrifice.”

In *Chouteau vs. Allen*, 70 Mo. 290, it appears (p. 305) that 125 \$1,000 first mortgage bonds of the C. & F. Ry. Co., secured by trust deed of 400,000 acres of land in Missouri, were pledged to secure a debt of the company, and the debt not being paid at maturity, the bonds were sold at public auction

in New York "at the usual place for such sales" for \$7.00 per bond, or 7/10 of one per cent. of their par value. The bonds were bid in at this price by the pledgees themselves, and it does not appear that there were any other bidders. The court holds that the sale was valid and the pledgees acquired a clear title to the bonds.

White, Receiver, vs. City of Rahway (Circuit Court N. J.), 16 Fed. 833, is a suit in which a credit was claimed by defendant on account of certain bonds which had been pledged as collateral security and sold at a price which defendant alleged was much less than their market value. The bonds, of the par value of \$50,000, had been pledged as security for an indebtedness of the same amount, and subsequently sold by the pledgee for some \$11,000, leaving a balance of \$40,000 remaining due on the original debt. The court says (p. 834):

"* * * It was insisted by the counsel for the city * * * that the bonds had been sold by the plaintiff *at much less than their market value*; and that the court should allow the defendant corporation the opportunity of *showing the true value of the said collaterals* in order to have the proper credit indorsed on the execution. * * * The plaintiff, on coming into the possession of the assets of the bank, found these collaterals, and, in pursuance of the authority vested in the bank when the

loan was made, handed them to the well-known stock auctioneers, A. H. Muller & Son, No. 7 Pine Street, New York, for public sale. They were regularly advertised to be sold at the exchange sales-room, 111 Broadway, for Wednesday, January 11, 1882, at 12:30 o'clock P. M. * * * that there were several bids for them, by which the price was run up somewhat, and they were struck down to a Mr. Bonner at 23½ per cent. * * * (p. 836). *The question is not whether a price was realized as great as might have been obtained under some other circumstances, but whether the plaintiff was free from all collusion, and acted within the limits of the authority conferred upon the bank, when the bonds were pledged, in regard to the mode of sale or default in the payment of the note."*

Farmers' National Bank of Annapolis vs. Verner, 78 N. E. 540, was an action to recover the balance due on a promissory note after the sale and application of the collateral. Judgment was entered for the plaintiff in the sum of approximately \$25,000, and it appeared that the collateral had been \$26,000 par value of bonds. From the amount remaining due on the note, it appears that the collateral must have been sold for something under five cents on the dollar, and there was testimony tending to show that other bonds of the same issue were sold for a very much higher price both before and after the sale in question. In other words, *it appears to have been proved that the bonds were*

sacrificed for very much less than their actual market value. The court says:

“The fact that the bonds were sold for very much less than bonds of the same issue had been sold for previously and were sold for subsequently, and the further fact, if such was the fact, that Mr. Quinlan, who bid off the bonds for the plaintiff bank, was the only bidder, do not invalidate the sale. There is nothing to show that other bidders were not present, and *mere inadequacy of price is not of itself sufficient ground for setting aside a foreclosure sale.*”

In *Fidelity Insurance Co. vs. Roanoke Iron Co.*, 81 Fed. 439, it appears that \$12,000 par value of bonds were pledged to secure a debt of \$5,000. Upon foreclosure, at public sale, they were bid in by the pledgee at a price which is not shown in the official report of the case. We have had the original records looked up by the clerk of the court, however, and ascertain that this \$12,000 of bonds was bid in by the pledgee for \$100, *or less than one cent on the dollar*. The court finds that the bonds were, as in the case at bar, “of uncertain value,” though representing, as in this case, a lien upon a large manufacturing plant. Upon the question of the pledgee’s title to the bonds, the court says:

“It would be imposing great hardship and injustice upon the pledgee, under the circumstances in this case, to say that while acting under the au-

thority given him by the pledgor, and in good faith, he shall be required to stand by and see the only security he has for the payment of his debt perhaps sacrificed, and he not permitted to protect his interests in the only way he can, by becoming a purchaser himself. The exception will be sustained, and, in the decree to be entered, Gwinner will be recognized as the owner of the bonds."

This language has been quoted and approved by the Circuit Court of Appeals, for the 2d Circuit, in *In re Mertens*, 144 Fed. 818.

Franklin National Bank vs. Newcombe, 37 N. Y. Sup. 271, affirmed in the New York Court of Appeals, 51 N. E. 1090, was an action to recover the balance due upon a promissory note for \$20,000, to secure which certain stock and bonds had been pledged as collateral. The note fell due August 15, 1893, and was not paid. On the 30th day of August, 1893, the plaintiff sold the collateral at auction. As stated by the court in its opinion:

"The securities brought very low prices, and were bought in by the plaintiff. * * * Defendants alleged, as an answer to the plaintiff's claim, that the plaintiff had made the sale above mentioned, wholly disregarding its duty in that behalf, and reckless of the rights of the defendants, * * * and that said stock and bonds were bought by plaintiff (except one bond) with scarcely any opposing bidding, at a price far below their actual value. * * * It was argued that this evidence tended to show an intent to injure the defendants upon the part of

plaintiff in making the sale. * * * *The sole evidence offered was that the securities brought very low prices, and that the plaintiffs bought them in.* The plaintiffs were pursuing their legal rights, and the defendants, if they had chosen, could have protected the securities, as they knew of the sale. We know of no reason why a creditor may not enforce his legal rights, in a legal way, at any time."

The cases cited by appellants upon this point contain some general language relative to the old common law obligations of pledgees, but each of the cases in fact turns upon some defect in the foreclosure proceedings, such as failure to advertise the sale, or failure to hold it in a public place, in accordance with the contract of pledge.

Foot vs. Utah Bank, 54 Pac. 104, which appellants cite on this point, is, as we have already pointed out, a case in which there was no public sale, since the collateral was, *without notice or advertisement of any kind, and without public attendance*, sold at the front door of the pledgee bank and wantonly sacrificed.

Laclede National Bank vs. Richardson, 56 S. W. 1117, which we have heretofore commented upon under another point, is decided on somewhat similar grounds.

Other cases cited, such as *Montague vs. Daves*, 14 Allen 373, concern the sale of real estate under

power of sale mortgages, in which considerations of intention of the parties and necessity for prompt liquidation do not require the same rules as in cases of foreclosure of pledged stocks and bonds.

Laches and Estoppel.

Even had there been grounds on which the Western Steel Corporation was entitled, at its election, to redeem the bonds after the sale in New York, such election could only have been made within a reasonable time after the sale, and in the case of securities issued by an unsuccessful company and secured by mortgage on an experimental plant, with the equity of the bonds liable at any time to be wholly consumed by the accumulation of other liens, such an election would have to be very promptly made.

It is shown by the record that the pledgor company made no objection to the sale of the bonds on August 30, 1911 (Transcript, p. 19), and that nothing was ever done by the pledgor or anyone else to set aside the sale, and that no question of the validity of the sale was ever raised until the objections were filed to the Trust Company's claim in the course of these bankruptcy proceedings. (Transcript, p. 21.) The trustees' objections to the Trust

Company's claim were filed April 15, 1912, nearly eight months after the bonds were sold in New York. (Transcript, p. 7.)

Under fundamental principles of equity neither the pledgor nor its trustees in bankruptcy had a right to speculate upon the outcome of the Steel Company's affairs, or to take the benefit of a right of redemption in case it proved profitable, without risking the \$25,000 which the Trust Company bid for the bonds, in case that should prove to be more than their eventual value. Suppose that, as in a large majority of bankruptcies, the assets had been exhausted in paying labor and other prior claims and expenses of administration, would not the indorser on the note have been entitled still to insist upon credit for the \$25,000 for which the bonds had been bid in? What the bankruptcy trustees really ask of this court is a ruling that pledgees bidding in collateral stocks and bonds take a title dependent on future developments as to the value of the securities, and that the pledgee may stand by and permit a sale of the securities without a protest, and months or years afterward make his election to attack or to affirm the sale.

Pledgee could not withdraw the bonds from auction sale, because of low price offered, without fraud on bidders
Benjamin on Sales, (5th Ed. pp. 483 (foot

if to be sold for full value only,
here would be no need for auction and
no bidders would attend.

IN CONCLUSION.

The fact that the Trust Company used between a quarter and a third of its \$2,000,000 of bonds in a blanket bid on the properties of the bankrupt is of course no criterion of the *value of the properties*. It was an *exchange*, not a *purchase*; for the bonds, far from being worth par, are not shown to be worth anything. We might as well have bid \$50,000 or \$1,000,000, *in bonds*, and either bid would have amounted to the same thing—an exchange of paper for options and incumbered mineral prospects, thereby exhausting the lien of the mortgage and leaving the remainder of the bonds worthless except for a trifling dividend in the bankruptcy court.

The Trust Company, a heavy loser by its loan of over half a million dollars which is gone to help pay the creditors of Western Steel Corporation, is at least entitled to see its paper securities approved, its barren claim sustained against the bankrupt corporation, and its good faith in the sale of its burdensome and nearly worthless collateral vindicated by the judgment of this court.

We respectfully submit that the order of the District Court should be affirmed.

FREDERICK BAUSMAN,

DANIEL KELLEHER,

ROBERT P. OLDHAM,

ROBERT C. GOODALE,

Solicitors for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MISSION TRANSPORTATION AND REFINING COM-
PANY, a Corporation, Claimant of the Barkentine
"FULLERTON," etc.,

Appellant,

VS.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

Apostles.

Upon Appeal from the United States District Court for the
Northern District of California, First Division.

FILED

APR 28 1913

United States
Circuit Court of Appeals
For the Ninth Circuit.

MISSION TRANSPORTATION AND REFINING COM-
PANY, a Corporation, Claimant of the Barkentine
"FULLERTON," etc.,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

Apostles.

Upon Appeal from the United States District Court for the
Northern District of California, First Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer of Mission Transportation and Refining Company	18
Answer to Cross-libel.....	35
Assignment of Errors.....	196
Assignment of Errors of Mission Transporta- tion and Refining Co.....	170
Certificate as to Exhibits.....	181
Certificate of Clerk U. S. District Court to Apostles	176
Certificate of Clerk U. S. District Court to Apostles on Cross-appeal.....	202
Citation	32
Claim of Mission Transportation & Refining Co.	17
Cross-libel	28
Decision, Memorandum	165
Decree Dismissing Cross-libelant's Libel.....	167
Decree Dismissing Libelant's Libel.....	168
DEPOSITION ON BEHALF OF CROSS- LIBELANT:	
GRANT, T. A.....	135
Cross-examination	145
Redirect Examination	163

	Index.	Page
EXHIBITS:		
Libelant's Exhibit 1 (Diagram).....		182
Claimant's Exhibit 1 (Chart—San Francisco Entrance)		183
Claimant's Exhibit 2 (Map Showing Forbidden Anchorage—Bay of San Francisco)		184
Claimant's Exhibit 3 (Diagram).....		185
Claimant's Exhibit 4 (Diagram).....		186
Claimant's Exhibit 5 (Diagram).....		187
Claimant's Exhibit 6 (Diagram).....		188
Claimant's Exhibit 7 (Diagram).....		189
Libel for Damages for Collision.....		7
Memorandum Decision		165
Minutes of Trial, etc.....		39
Monition		14
Notice of Cross-appeal of Southern Pacific Company from Decree Dismissing Libel.....		195
Notice of Filing of Apostles on Cross-appeal....		204
Notice of Mission Transportation & Refining Co. of Appeal from Decree Dismissing Cross-libel		169
Notice of Mission Transportation and Refining Co. of Filing of Apostles on Appeal.....		179
Opinion		165
Order Extending Time to March 15, 1913, in Which to File Apostles on Appeal.....		177
Order Extending Time to April 1, 1913 to File Transcript of Appeal		178
Order Submitting Cause, etc.....		40
Praeceptum for Apostles.....		6

Index.	Page
Praeceptum for Apostles on Cross-appeal.....	193
Proceedings Had Concerning Excerpt from Log.	133
Statement of Clerk U. S. District Court.....	1
Statements and Stipulations of Counsel Regarding Facts, etc.....	41
Stipulation and Order Re Exhibits.....	175
Stipulation That Record on Appeal may Constitute Record on Cross-appeal.....	201
Testimony Taken in Open Court.....	41
TESTIMONY ON BEHALF OF LIBELANT:	
FAHRENHOLTZ, RAYMOND M.....	114
Cross-examination	118
HEALEY, ABRAHAM	130
Cross-examination	131
HIGGINSON, WILLIAM H.....	46
Cross-examination	53
Redirect Examination	83
JOHNSON, HARRY A.	121
Cross-examination	124
OLSSON, PHILIP	125
REICHELT, ERNEST D.	88
Cross-examination	97
Redirect Examination	112
WALLON, OLAF	127
Cross-examination	129
Undertaking on Appeal of Mission Transportation and Refining Co.	173
Undertaking on Cross-appeal.....	199

*In the District Court of the United States, in and
for the Northern District of California.*

No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Libelant,

vs.

Barkentine "FULLERTON," Her Tackle, Ap-
parel and Furniture,

Respondent.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,

Claimant.

Statement of Clerk U. S. District Court.

PARTIES.

Libelant: Southern Pacific Company, a Corporation.

Cross-libelant: Mission Transportation and Refining
Company, a corporation.

Respondent: Barkentine "Fullerton," her tackle,
apparel and furniture. [1*]

Cross-respondent: Southern Pacific Company, a
corporation.

Claimant: Mission Transportation and Refining
Company, a corporation.

PROCTORS.

Libelant: J. E. Foulds, Esquire, assisted by L. T.
Hengstler, Esquire, San Francisco, Cal.

Cross-libelant: Messrs. Page, McCutchen, Knight
and Olney, and Ira A. Campbell, Esquire, San
Francisco, Cal.

*Page-number appearing at foot of page of original certified Record.

Respondent: Messrs. Page, McCutchen, Knight and Olney, San Francisco, Cal.

Cross-respondent: J. E. Foulds, Esquire, assisted by L. T. Hengstler, Esquire, San Francisco, Cal.

Claimant: Messrs. Page, McCutchen, Knight and Olney, San Francisco, Cal.

1910.

August 25. Filed verified Libel for damages on account of collision in the sum of \$4,105.62, etc.

“ “ Issued Monition for the attachment of the barkentine “Fullerton,” and which said Monition was afterwards on the 31st day of August, 1910, returned and filed with [2] the following return of the United States Marshal endorsed thereon:

“In obedience to the within Monition, I attached the barkentine ‘Fullerton’ therein described, on the 26th day of August, 1910, and have given due notice to all persons claiming the same that this Court will, on the sixth day of September, 1910 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that

I posted a notice of attachment on said barkentine 'Fullerton' and handed a copy of this monition to O. Oleson, person in charge. I also placed a keeper thereon. Attachment made at the drydocks of the Union Iron Works, San Francisco Bay.

C. T. ELLIOTT,

United States Marshal.

Paul J. Arnerich,

Deputy.

San Francisco, Cal., August 26,

1910.

1910."

August 26. Filed claim of the Mission Transportation and Refining Company to the barkentine "Fullerton," etc.

" 26. Filed stipulation for the release of the barkentine "Fullerton," in the sum of \$5,000, with the Fidelity and Deposit Company of Maryland, as surety. [3]

December 30. Filed Answer of Mission Transportation and Refining Company, to Libel.

" 30. Filed Cross-Libel of the Mission Transportation and Refining Company.

" 31. Issued Citation for the appearance of the Southern Pacific Company, a corporation, to appear

1910.

and answer the Cross-Libel of the Mission Transportation and Refining Company, filed herein; and which said Citation was afterwards on the 5th day of January, 1911, returned and filed with the following return of the United States Marshal endorsed thereon:

“I have served this writ personally by copy on Southern Pacific Company, (a Corporation), the Cross-libellee herein named, by handing to and leaving with F. H. Reed, who is the person designated by the Defendant under the Statutes of the State of California upon whom all legal process shall be served in matters affecting the Southern Pacific Co. (a corp.) in the State of California, an attested copy of the annexed Citation in the City and County of San Francisco, in the State and Northern District of California, January 3, 1911.

Dated at San Francisco, California, this fourth day of January, A. D. 1911.

C. T. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,
Office Deputy Marshal.” [4]

1911.

January 17. Filed Answer of Southern Pacific Company to Cross-libel.

1913.

January 16. Filed Deposition of T. A. Grant, taken on behalf of claimant.

January 17. The above-entitled cause this day came on for hearing before the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the Northern District of California, and after hearing was continued to January 20, 1913, when the cause was argued and submitted to the Court.

January 24. Filed Memorandum of Decision, dismissing the Libel and Cross-libel in this cause.

January 25. Filed Transcript of Testimony taken in open Court.

February 1. Filed Decree dismissing Cross-libel.

February 5. Filed Decree dismissing Libel.

February 10. Filed Mission Transportation and Refining Company's notice of appeal.

February 20. Filed Bond on Appeal.

March 10. Filed Assignment of Errors. [5]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,070.

MISSION TRANSPORTATION AND REFINING COMPANY, a Corporation,

Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
tion,

Cross-respondent.

Praecipe [for Apostles].

To the Clerk of the Above-entitled Court:

You will please prepare the Apostles in this case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal heretofore perfected in said court by cross-libelant, and include in said apostles, the following pleadings, proceedings and papers on file, to wit:

1. All those papers required by section 1 of paragraph 1 of Rule 4 of the Rules in Admiralty of the United States Circuit Court of Appeals.

2. All the pleadings in said cause, including the cross-libel, the claim and answer to said cross-libel, with all the exhibits annexed thereto.

3. All the testimony and other proofs adduced in the cause, including the testimony taken at the trial; all depositions taken by either party and admitted in evidence and all [6] exhibits introduced by either party and to be sent up as original exhibits.

4. The opinion and decision of the Court.
5. The final decree and notice of appeal.
6. The assignment of errors.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Cross-libelant and Appel-
lant herein.

[Endorsed]: Filed Feb. 20, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [7]

*In the District Court of the United States, Northern
District of California.*

IN ADMIRALTY.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Libelant,

vs.

Barkentine "FULLERTON," Her Tackle, Ap-
parel and Furniture,

Defendant.

Libel for Damages for Collision.

To the Honorable J. J. DE HAVEN, Judge of the
United States District Court, Northern District
of California, in Admiralty.

The libel of Southern Pacific Company, a corpora-
tion, against the barkentine "Fullerton" alleges:

I.

That libelant is a corporation created and existing
under laws of the State of Kentucky in the United
States of America, and engaged in the maintenance

and operation of railroads and appurtenances thereunto appertaining, in the State of California, under lease of same from the owners thereof for a period of ninety years from and including the first day of January, 1894.

That among said railroads and appurtenances are and at all the times herein mentioned were included all steamers used in, or in connection with their operation, across and over the bay of San Francisco, for the transportation of freight-cars, and that one of the steamers therein and so employed was, at all the times [8] hereinafter mentioned, and still is, the steamer "Transit," said steamer, together with the railroad to which same was and is appurtenant, being the property of the Central Pacific Railway Company, a corporation duly created and existing under the laws of the State of Utah, in the United States of America, and at all the times herein referred to was, as aforesaid, duly possessed, leased and operated by said libelant.

That pursuant to the terms of the lease of same this libelant was required to expend, and did expend, all moneys requisite for the repair of same by reason of any injury or damage thereto occurring during its possession thereof, and all of the moneys required for the repairs hereinafter set forth were advanced and paid by said libelant, and said libelant is the true and *bona fide* owner thereof and of all claims therefor, and no other person is the owner of same or any part thereof.

II.

That during all of the times hereinafter mentioned

said steamer was managed, controlled and operated by a skillful master, officers, seamen and employees, and plied regularly in such business as is hereinbefore mentioned across and over the bay of San Francisco, in the State of California, in the United States of America, between the city of Oakland and the city and county of San Francisco.

III.

That on or about the 13th day of December, 1909, at about 11 o'clock P. M. of said day, said steamer "Transit," in the command and under the direction of the master thereof, and subject to the services of its officers, seamen and employees, and in the operation of the business of libelant as hereinbefore set forth, commenced her regular trip from and at said city of Oakland to said city and county of San Francisco, to the terminus or point of landing of said steamer "Transit," at said city and county of San [9] Francisco, usually known as and called Mission Bay Slip, adjacent or near to the portion of said Bay of San Francisco, known as Mission Bay.

That during said trip of said steamer from the city of Oakland to said city and county of San Francisco she was interrupted by a heavy fog; that during her said course thereon she entirely proceeded under a slow bell, and careful and slow management, her helm being entirely under the hands and in control of her master, in the pilot-house thereof, he then and there and therein being assisted by the first officer of said steamer and one of its deck-hands, all windows of said pilot-house being then retained open and unenclosed, and the fog whistle of said steamer

being sounded continuously by such assistants, at intervals of from thirty to forty seconds, the engines and machinery of said steamer being then and there in charge of and operated by her chief and assistant engineers and their subordinate employees, under the directions of its said master.

That said master and his assistants, as aforesaid, in said pilot-house, made during said trip all efforts to discover any approaching vessel or danger therefrom, or the anchorage of any ship or vessel in or about its course or elsewhere, by careful inspection and discovery from said pilot-house of all vessels to which said steamer might be approaching, or which might approach it, or be visible to said master and assistants, and also of recognition of all bells or fog signals of any kind sounded by any vessel so anchored, or approaching, or being approached, or immediately or at all perceptible to them or either of them.

That in addition to the officers above mentioned and said master, and for like purposes of safety, there were also during said trip, upon the bow of said steamer "Transit," the second officer of same and four deck-hands thereof, whose attention was wholly [10] occupied in like attempts to ascertain the location of any and all vessels anchored, or proceeding, or approaching or being approached, and to detect the sounding at any time of any bell or fog signal from any such vessel.

That twenty-five minutes after leaving said Oakland, while upon her course to San Francisco, the master, officers and deck-hands of said steamer

“Transit” heard the fog bell located at said Mission Bay slip ringing, but up to said time had heard no bell or fog signal from any vessel, nor had seen any vessel anchored, approaching, or being approached by her, or otherwise visible; that three or five minutes later the lookouts last above mentioned reported a light upon the port bow of said steamer “Transit” and close aboard, when her helm was put hard-to-port, and a signal given to her engineers for full speed ahead, trying to sheer off from any vessel indicated by such light, but it was then too late to avoid collision with the barkentine “Fullerton” hereinafter described, upon which said light was exhibited, the bowsprit thereof being not more than two or three feet back from the forward pilot-house of the “Transit.” On discovery of this fact two bells were given by the master of the “Transit” to its engineer, to stop the engine, but the headway, little as it was, brought the “Transit” right about midship across the bow of the “Fullerton,” tearing off the top of the port paddle-box and bridge thereof of the “Transit,” the bowsprit of the former tearing down the funnel of the latter, and the cut-water and bobstays of the “Fullerton” damaging the guard and spring beam of the “Transit.” That in consequence of said damages and other damages resulting therefrom or connected therewith the sum of \$4,105.62, in lawful money of the United States of America, was actually expended by libellant herein at its own cost and expense, in the repair of said steamer “Transit.” [11]

IV.

That the barkentine "Fullerton" hereinbefore mentioned is a four-masted vessel, and at the time of the collision heretofore recited was anchored at a point near to the fairway of said steamer "Transit" required for her said passage from the city of Oakland to the city and county of San Francisco, and during said period was encompassed by a dense fog, but failed to sound any bell or other fog signal capable of being heard or recognized by the master, officers, seamen or employees of any vessel upon said passage, or in anywise approaching said "Fullerton," and that by reason of such failure the anchorage and position of said vessel was wholly unknown to or recognizable by the master, officers, seamen or employees of said steamer "Transit," or any of them, except as hereinbefore set forth, and then not until after its light had been seen by the latter under such conditions as to avoid the possibility of collision of said "Fullerton" with said steamer "Transit," and the damage and injury to said steamer "Transit," and the outlay therefor by libellant, as hereinbefore set forth.

V.

That at all the times hereinbefore mentioned said "Fullerton" was and still is on navigable waters, to wit, upon the bay of San Francisco aforesaid, within the admiralty and maritime jurisdiction of the United States, and within the port of San Francisco and Northern District of California, wherein this libel is filed.

VI.

Libelant further states that the cause within this libel set forth is one civil and maritime, to wit, of tort and damage, namely, of collision as aforesaid, and that this libel propounds and articulates in distinct articles the various allegations of [12] fact upon which said libelant relies in support of its suit; so that the above-named defendant may be enabled to answer distinctly and separately the several matters contained in each article, and that all the said premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the libelant prays that process in due form of law according to the course of this Court in causes of admiralty and maritime jurisdiction may issue against the said barkentine "Fullerton," her tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of the damages, to wit, \$4,105.62, as aforesaid, in lawful money of the United States, with costs and interest, and that the said vessel may be condemned and sold to pay the same, and that the libelant may have such other and further relief in the premises as in law and justice it may be entitled to.

J. E. FOULDS,

Proctor for Libelant. [13]

Northern District of California,—ss.

W. F. Ingram, being duly sworn, deposes and says: That he is an officer, to wit, the Assistant Secretary of the Southern Pacific Company, above named as libelant herein; that he has read the foregoing libel and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. Affiant further declares that the said Southern Pacific Company, by whom and on whose behalf the claim set forth in said libel is made, is the true and *bona fide* owner of said claim, and that no other person is the owner thereof.

W. F. INGRAM.

Sworn to before me this 23d day of August, 1910.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 25, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [14]

Monition.

Northern District of California,—ss.

The President of the United States of America, to the Marshal of the United States for the Northern District of California, Greeting:

WHEREAS, a Libel hath been filed in the District Court of the United States for the Northern District of California, on the 25th day of August, in

the year of our Lord one thousand nine hundred and ten:

By SOUTHERN PACIFIC COMPANY, a corporation, against The Barkentine "Fullerton," her tackle, apparel and furniture, in a cause of collision, civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said vessel, her tackle, etc., may for the causes in said Libel mentioned be condemned and sold to pay the demands of the libellant,—

YOU ARE THEREFORE HEREBY COMMANDED to attach the said vessel, her tackle, etc., and to retain the same in your custody until the further order of the Court respecting the same and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Northern District of California, on the SIXTH day of SEPTEMBER, A. D. 1910, at ten o'clock in the forenoon of the same day, if that day shall [15] be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf.

And what you shall have done in the premises do

you then and there make return thereof, together with this writ.

Witness the Hon. JOHN J. DE HAVEN, Judge of the said Court, at the City and County of San Francisco, in the Northern District of California, this 25th day of August, in the year of our Lord, one thousand nine hundred and ten, and of our independence the one hundred and 35th.

[Seal]

JAS. P. BROWN,
Clerk.

By M. T. Scott,
Deputy Clerk.

J. E. FOULDS,
Proctor for Libellant.

MARSHAL'S RETURN.

In obedience to the within Monition, I attached the barkentine "Fullerton" therein described on the 26th day of August, 1910, and have given due notice to all persons claiming the same that this Court will, on the sixth day of September, 1910 (if that day be a day of jurisdiction; if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of attachment on said barkentine "Fullerton" and handed a copy of this Monition to O. Oleson, person in charge. I also placed a keeper thereon. Attachment made at the drydocks of the Union Iron Works, San Francisco Bay.

C. T. ELLIOTT,
United States Marshal.
By Paul J. Arnerich,
Deputy.

San Francisco, Cal., August 26, 1910.

[Endorsed]: Filed Aug. 31, 1910. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [16]

*In the District Court of the United States of America,
Northern District of California.*

IN ADMIRALTY—No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corporation,
Libelant,

vs.

Barkentine “FULLERTON,” etc.

Claim of Mission Transportation & Refining Co.

To the Honorable JOHN J. DE HAVEN, Judge of
the District Court of the United States for the
Northern District of California:

The claim of Mission Transportation and Refining Company, a corporation, to the barkentine “Fullerton,” her tackle, apparel and furniture, now in the custody of the Marshal of the United States for the said Northern District of California, at the suit of Southern Pacific Company, a corporation, alleges—

That Mission Transportation and Refining Co., a corp., the true and *bona fide* owner of the said barkentine “Fullerton,” her tackle, apparel and furniture, and that no other person is owner thereof.

Wherefore, this claimant prays that this Honorable Court will be pleased to decree a restitution of the same to Mission Transportation and Refining Company, a corporation, and otherwise right and justice to administer in the premises. [17]

MISSION TRANSPORTATION AND RE-
FINING COMPANY.

By W. G. TUBBY, Manager.

Northern District of California,—ss.

Subscribed and sworn to before me this 26th day of August, A D. 1910.

[Seal]

FRANCIS KRULL,

Deputy Clerk U. S. District Court, Northern District of California.

PAGE, McCUTCHEN & KNIGHT,

Proctors for Claimant.

[Endorsed]: Filed Aug. 26, 1910. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [18]

In the District Court of the United States, Northern District of California.

SOUTHERN PACIFIC COMPANY, a Corporation,
Libelant,

vs.

Barkentine "FULLERTON," Her Tackle, Apparel and Furniture,

Respondent.

MISSION TRANSPORTATION & REFINING
COMPANY, a Corporation,

Claimant.

Answer of Mission Transportation and Refining Company.

To the Honorable JOHN J. DE HAVEN, Judge of the Above-entitled Court:

The answer of Mission Transportation & Refining Company, a corporation, claimant herein, to the libel herein, admits, denies and alleges as follows:

I.

Answering the allegations of paragraph I of said libel, claimant admits the allegations contained in that portion of said paragraph, commencing with the beginning thereof, and continuing down to, and including, the word "libelant," [19] in the seventh line of the second page of said libel.

Claimant has no information or belief sufficient to enable it to answer the allegations contained in that portion of paragraph I of said libel, commencing with the word "that," in the eighth line of page two of said libel, and continuing down to, and including, the word "therefor," in the fourteenth line on the second page of said libel, and, placing its denial thereof on that ground, and for that reason, denies that pursuant to the terms of the lease of said steamer "Transit," or at all, libelant was required to expend, or did expend, all, or any, of the moneys requisite for the repair of the same, by reason of any injury or damage thereto, occurring during its possession thereof; and

For the same reason, claimant further denies that all, or any, of the moneys required for the repairs thereafter set forth, were advanced and paid by said libelant, or that said libelant is a true and *bona fide* owner of any, or all, claims therefor; but claimant admits that no other person, or any person, is the owner of the same, or any part thereof.

II.

Answering the allegations of paragraph II of said libel, claimant denies that during all of the times, or during any of the times therein mentioned, said

steamer was managed, controlled and operated by skillful master, officers, seamen or employees.

Further answering the remaining allegations of said paragraph, claimant admits that said steamer plied regularly in such business as thereinbefore mentioned, [20] across and over the bay of San Francisco, in the State of California, in the United States of America, between the city of Oakland, and the city and county of San Francisco.

III.

Answering the allegations of paragraph III of said libel, claimant admits that on or about the 13th day of December, 1909, at about eleven o'clock P. M. of said day, said steamer "Transit," in command, and under the direction, of the master thereof, and subject to the services of its officers, seamen and employees, and in the operation of the business of libelant, thereinbefore set forth, commenced her regular trips from, and at, said city of Oakland, to said city and county of San Francisco, to the terminus, or point of landing, of said steamer "Transit," at said city and county of San Francisco, known as, and called, Mission Bay slip, adjacent or near to that portion of said bay of San Francisco, known as Mission Bay; and that during said trip of said steamer from the city of Oakland to said city and county of San Francisco, she was interrupted by heavy fog.

Claimant has no information or belief sufficient to enable it to answer the allegations contained in that portion of paragraph III, of said libel, commencing with the word "that" in the sixth line on the third page of said libel, and continuing down to, and in-

cluding the word "Transit," at the close of said paragraph in the thirtieth line on the fourth page of said libel, and, placing its denial on that ground, and for that reason, denies that during her said course thereon, or at any time, said steamer entirely, [21] or at all, proceeded under a slow bell and careful and slow management, and denies that her helm was entirely in the hands of, and under the control of, her master, in the pilot-house thereof; that he then and therein was assisted by the first officer of said steamer, and or one of his deck-hands; and denies that the windows of said pilot-house were retained open and unenclosed, and denies that the fog whistle of said steamer was sounded continuously by such assistant, at intervals of from thirty to forty seconds, and denies that the engines and machinery of said steamer were then and there in charge of and operated by her chief and assistant engineers, and their subordinate employees, under the direction of her said master.

For the same reason, claimant denies that said master and his assistants, or his assistants, as aforesaid, in said pilot-house, or elsewhere, made, during said trip all or any efforts to discover any approaching vessel or danger therefrom or the anchorage of any vessel, in or about its course, or elsewhere, by careful, or any, inspection and discovery, from said pilot-house or any other place of all vessels to which said steamer might be approaching, or which might approach it, or be visible to said master and assistants; and denies that they made any effort of recognition of any, or all, or any, vessel, or fog signals,

of any kind, sounded by any vessel so anchored or approaching, or being approached, or immediately, or at all, perceptible to them, or either of them.

For the same reason, claimant denies that in addition to the officers above mentioned, and said master, [22] or at all, and or for like purposes of safety, there were also, during said trip, or at all, upon the bow of said steamer "Transit" the second officer of the steamer and four deck-hands thereof, or any officer, or deck-hands, whose attention was solely, or at all, occupied in like attempts to ascertain the location of any, or all, vessels anchored or proceeding, or approaching, or being approached, and or to detect the sounding, at any time, of any bell, or any signal, from any such vessel.

For the same reason, claimant denies that twenty-five minutes after leaving said Oakland, or at any time, while upon her course to San Francisco, the master, officers, or deck-hands of said steamer "Transit" heard the fog bell, located at Mission Slip, ringing, and denies that up to said time they had heard no fog bell or fog whistle, from any vessel, nor had seen any vessel anchored, approaching, or being approached by her, or otherwise visible.

And for the same reason, claimant denies that three or five minutes later, or at all, the lookouts, last above mentioned, or any lookouts, reported a light on the port bow of the steamer "Transit," and close aboard, and denies that her helm was put hard to port, and a signal given to her engineers for full speed ahead, and denies that she tried to sheer off from said vessel, indicated by such light, or that it was then too

late to avoid collision with the barkentine "Fullerton," or that the bow thereof was not more than two or three feet back from the forward pilot-house of the "Transit"; except that claimant admits that a light was exhibited on said "Fullerton." [23]

And for the same reason, claimant denies that on the discovery of the position of the barkentine "Fullerton," two bells were given by the master of the "Transit" to his engineers, to stop the engines, but claimant admits that the headway of the steamer "Transit" brought her right about amidships, across the bow of the "Fullerton," and claimant denies that said headway of said steamer "Transit" was slight or slow.

For the same reason, claimant denies that said collision tore off the top of the port paddle-box and bridge of the "Transit," or that the bowsprit of the "Fullerton" tore down the funnel of the "Transit," or that the cut-water and bobstays of the "Fullerton" damaged the guard and springbeam of the "Transit," or that in consequence of said damages, or any damages, resulting therefrom, or connected therewith, the sum of four thousand one hundred and five and 62/100 (\$4,105.62), or any other sum, in lawful money of the United States of America, was actually expended by libelant herein, at its own cost and expense, in the repair of said steamer "Transit."

IV.

Answering the allegations of paragraph IV, of said libel, claimant admits that the barkentine "Fullerton" hereinbefore mentioned, was a four-masted vessel, but claimant denies that at the time of the colli-

sion, heretofore recited, or at any other time, said barkentine was anchored at a point near to the fairway of said steamer "Transit," required for her passage from the city of Oakland to the city and county of San Francisco. [24]

Claimant admits that portion of said paragraph, alleging that during said period, said barkentine "Fullerton" was encompassed by a dense fog, but claimant denies that said barkentine "Fullerton," and or the officers or crew thereof, failed to sound any bell or other fog signal, capable of being heard or recognized by the master, officers, seamen or employees or any vessel upon said passage, or in any wise approaching said "Fullerton," and claimant further denies that by reason of such failure, or any failure, the anchorage and position of said vessel was wholly unknown to, or unrecognizable by, the master, officers, seamen or employees of said steamer "Transit," and further denies that the anchorage and position of said "Transit" was wholly unknown to, or unrecognizable by, the master, officers, seamen and of employees of said steamer "Transit," until after the light on said "Fullerton" had been seen by the master, officers, seamen or employees of said steamer "Transit," under such conditions as to make unavoidable a collision of said "Transit" with said "Fullerton," and claimant further denies that damage and injury to said steamer "Transit," and the outlay therefor, by libelant, occurred as thereinbefore set forth.

V.

Claimant admits the allegations of paragraph V of said libel.

VI.

Answering the allegations of paragraph VI of said libel, claimant denies that the cause within the libel set forth is one of civil and maritime, to wit, of tort and damage namely of collision, as aforesaid, or that there is any cause [25] of action at all, but admits that the libel propounds and articulates the various allegations of fact, upon which said libelant relies, in support of its suit, except that libelant does not admit the truth of said various allegations.

Claimant further denies that the libel propounds and articulates in distinct articles, the various allegations of fact, upon which said libelant relies in support of its suit, so that respondent and claimant may be enabled to answer distinctly and separately, the several matters contained in each article.

Answering the further allegations of said paragraph, claimant admits that said premises are within the admiralty and maritime jurisdiction of the United States, and this Honorable Court, but denies that said premises are true.

VII.

And further answering said libel, claimant alleges the truth to be that on the night of December 13, 1909, at about eleven o'clock, while said barkentine "Fullerton" was properly and lawfully anchored in the bay of San Francisco, and within the anchorage zone fixed by the rules and regulations of the Harbor Commissioners of the Port of San Francisco, and while encompassed by a fog, prevailing over that portion of the waters of the bay of San Francisco, in which said "Fullerton" was anchored, the said

steamer "Transit," while on a trip from the city of Oakland to Mission Bay slip, in the city of San Francisco, ran into, and collided with, said "Fullerton," and seriously damaged the latter, and caused claimant a loss, amounting to the sum of one thousand eight hundred and thirty and [26] 69/100 dollars (\$1830.69); that at and prior to the time of said collision, said "Fullerton" was equipped with the lights and fog bell, required by law, which lights were kept brightly burning, and which fog bell was duly and regularly run, during the prevalence of said fog, by the lookout maintained on board said "Fullerton," as by law required; that the presence and position of said "Fullerton" was well known to the master, officers and crew of said "Transit," and that said collision resulted from no act or fault or neglect on the part of the owners of said "Fullerton," her master, officers or crew, but said collision was solely due to the careless, negligent and unlawful navigation of said steamer "Transit" in said fog.

WHEREFORE, claimant prays that the libel herein may be dismissed, and that it may recover its costs and disbursements herein incurred, and such other and further relief as shall be deemed meet and equitable in the premises.

MISSION TRANSPORTATION & REFINING COMPANY.

By W. G. TUBBY,

Manager Marine Department.

PAGE, McCUTCHEN, KNIGHT, OLNEY,
IRA A. CAMPBELL,

Proctors for Claimant. [27]

State of California,
City and County of San Francisco,—ss.

W. G. Tubby, being first duly sworn, deposes and says: That he is the Manager Marine Department of Mission Transportation & Refining Company, a corporation, claimant herein; that he has read the foregoing answer, and knows the contents thereof, and believes the same to be true.

W. G. TUBBY.

Subscribed and sworn to before me this 30th day of December, 1910.

FRANK L. OWEN,
Notary Public, in and for the City and County of San
Francisco, State of California.

[Endorsed]: Filed Dec. 30, 1910. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [28]

*In the District Court of the United States, Northern
District of California.*

No. 15,070.

MISSION TRANSPORTATION & REFINING
COMPANY, a Corporation,

Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Cross-respondent.

Cross-Libel.

To the Honorable JOHN J. DE HAVEN, Judge of
the Above-entitled Court:

The cross-libel of the Mission Transportation & Refining Company, a corporation, against the Southern Pacific Company, a corporation, articulately propounds and alleges as follows:

I.

That the Mission Transportation & Refining Company, cross-libelant herein, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and was, during all the times herein mentioned, and now is, the owner of the barkentine "Fullerton," an American vessel of about 1554 gross tons, register.

II.

That the Southern Pacific Company, cross-respondent herein, is a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky, and [29] was, during all the times herein mentioned, the time-chartered owner and operator of the steamer "Transit," a car ferry, and was responsible for the acts of the master, officers and crew of said steamer.

III.

That on the night of the 13th day of December, 1909, said barkentine "Fullerton" was properly and lawfully anchored in the Bay of San Francisco, south of the 16th Street fairway, leading to Mission Bay, and within the anchorage zone fixed by the Rules and Regulations of the Harbor Commissioners, governing

the anchoring of vessels in the Bay and Harbor of San Francisco; that said vessel was anchored in said position on the 20th day of September, 1909, by one of the tugs belonging to the Shipowners and Merchants' Tugboat Company, and had there remained during the subsequent intervening period until the happening of said collision.

IV.

That on or about the hour of 11:20 P. M. of said 13th day of December, said steamer "Transit," while making a trip from her usual berth on the Oakland shore to Mission Bay slip, in the city and county of San Francisco, ran into and collided with, said barkentine "Fullerton," striking the forward part of said "Fullerton," and inflicting on her the herein-after mentioned damages.

V.

That at and preceding the time of said collision a heavy fog prevailed over the waters of that portion of San Francisco Bay, in which said "Fullerton" was anchored, [30] and enshrouded said barkentine; that said "Transit" was, at the time of, and preceding said collision, proceeding through said fog at an unlawful rate of speed, and was being navigated without said master being in his proper position, and without the necessary lookouts required by law, stationed on the bow and bridge of said steamer, where said master and said lookouts could have an unobstructed view and range of hearing.

That said steamer "Transit" had traversed said course from Oakland to Mission Bay slip and return, several times a day, during the entire period said

barkentine "Fullerton" was anchored in her heretofore described position, and had, on the same night, at about 9 o'clock P. M., left said Mission Bay slip, and voyaged to Oakland; that by reason of said facts, the master, officers and crew of said steamer "Transit" well knew the location and position in which said barkentine "Fullerton" was anchored, but, notwithstanding said knowledge and said fog, said master negligently and carelessly navigated said steamer at said undue rate of speed, and caused said steamer to collide with said barkentine "Fullerton."

VI.

That said barkentine "Fullerton," during said night of December 13, and at the time of said collision, had stationed on board, the lookout required by law, and was properly and efficiently equipped, during all said time, with the lights and fog bell required by law, which lights were, at the time of, and during all time prior to, said collision, burning brightly, and which fog bell was duly and regularly rung by said lookout during said night, while said fog prevailed, and particularly so rung at, and immediately prior to, the time of said collision. [31]

VII.

That by reason of said collision said barkentine "Fullerton" had her headgear and figurehead carried away, and her stem and bow badly injured, to cross-libelant's damage, in the sum of one thousand eight hundred and thirteen and 69/100 (\$1813.69) dollars.

VIII.

That said collision was due to the improper, care-

less and negligent management and navigation of said steamer "Transit," and was, in no respect, due to any fault or negligence on the part of said barkentine "Fullerton," her officers or crew.

IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

THEREFORE, cross-libelant prays that a citation, in due form of law, according to the course and practice of this Honorable Court, in cases of admiralty and maritime jurisdiction, may issue against the said Southern Pacific Company, a corporation, and that it be cited to appear and answer under oath, all and singular, the matters aforesaid, and that this Honorable Court may be pleased to decree payment of the aforesaid sum of one thousand eight hundred and thirteen and 69/100 (\$1,813.69) dollars, with interest and costs herein incurred; and that it may have such other and further relief as may be deemed meet and equitable in the premises.

MISSION TRANSPORTATION & REFINING COMPANY.

By W. G. TUBBY,

Manager Marine Department.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
IRA A. CAMPBELL,

Proctors for Cross-libelant. [32]

State of California,

City and County of San Francisco,—ss.

W. G. Tubby, being first duly sworn, deposes and says:

That he is the manager of the Marine Department of Mission Transportation & Refining Company, a corporation; that he has read the foregoing cross-libel, knows the contents thereof, and believes the same to be true.

W. G. TUBBY.

Subscribed and sworn to before me this 30th day of December, 1910.

FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Dec. 30, 1910. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [33]

Citation.

Northern District of California,—ss.

The President of the United States of America, to
the Marshal of the United States for the North-
ern District of California, Greeting:

Whereas, a cross-libel has been filed in the Dis-
trict Court of the United States for
(Seal) the Northern District of California, on
the 30th day of December, in the year
of our Lord one thousand nine hundred
and ten:

By Mission Transportation & Refining Company,
a corporation, cross-libelant against Southern Pa-
cific Company, a corporation, cross-libelee, in a cer-
tain cause now pending in this court and entitled,
Southern Pacific Company, a corporation, against the
barkentine "Fullerton," her tackle, apparel and fur-

niture, Mission Transportation & Refining Company, a corporation, claimant, in a certain action for damages, civil and maritime, to recover the sum of \$1813.69 (as by said cross-libel, reference being hereby made thereto, will more fully and at large appear), therein alleged to be due the said cross-libelant; and praying that a citation may issue against the said cross-libelee, pursuant to the rules and practice of this court:

NOW, THEREFORE, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said cross-libelee, if it shall be found in your District, that it be and appear before the said District Court, on Tuesday, the 17th day of January A. D. 1911, at 10 o'clock in the forenoon at the courtroom in the city of San Francisco, then and there to answer the said cross-libel, and to make its allegations in that behalf; and have you then and there this writ, with your return thereon.

Witness, the Honorable JOHN J. DE HAVEN, Judge of said Court, the 31st day of December, in the year of our Lord one thousand nine hundred [34] and ten, and of our independence, the one hundred and 35th.

JAS. P. BROWN,
Clerk.

By M. T. Scott,
Deputy Clerk.

PAGE, McCUTCHEN, KNIGHT & OLNEY.
Proctors.

MARSHAL'S RETURN.

I have served this writ personally by copy on Southern Pacific Company (a corporation), the cross-libellee herein named, by handing to and leaving with F. H. Reed, who is the person designated by the defendant under the Statutes of the State of California, upon whom all legal process shall be served in matters affecting the Southern Pacific Co. (a corp.) in the State of California, an attested copy of the annexed Citation in the City and County of San Francisco, in the State and Northern District of California, January 3, 1911.

Dated at San Francisco, California, this fourth day of January, A. D. 1911.

C. T. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,

Office Deputy Marshal.

[Endorsed]: Filed Jan. 5, 1911. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [35]

*In the District Court of the United States, Northern
District of California.*

No. 15,070.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,

Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY,

Cross-respondent.

Answer to Cross-Libel.

The answer of Southern Pacific Company, cross-respondent herein, to the cross-libel herein, denies, admits and alleges as follows:

I.

As to Article I of said cross-libel, this respondent admits the allegation thereof.

II.

As to Article II of said cross-libel, this respondent admits the allegations thereof.

III.

As to Article III of said cross-libel, this respondent denies that the said barkentine "Fullerton" was properly or lawfully anchored in the bay of San Francisco, south of the Sixteenth Street fairway, leading to Mission Bay, or elsewhere, or within the anchorage zone fixed by the Rules and Regulations of the Harbor Commissioners, governing the anchorage of vessels in the bay and harbor of San Francisco, or elsewhere, or that said vessel was anchored in said or [36] other proper or lawful position on the 20th day of September, 1909, or at any other time, by one of the tugs belonging to the Shipowners and Merchants' Tugboat Company, or any other tug, or other instrument intended for use in such anchorage, or that thereafter, or at any time subsequent to such anchorage, said barkentine had remained at such anchorage during the subsequent intervening period, or any part thereof, until the happening of said collision.

IV.

This respondent denies that on or about the hour

of 11:20 P. M. of the 13th day of December, 1909, or at any other time, the steamer "Transit," in said cross-libel mentioned, while making the trip therein referred to, or any other trip of like character, ran into, or collided with, the barkentine "Fullerton," striking the forward part of said "Fullerton," or inflicting on her the damages mentioned in said cross-libel, or any damages whatsoever, by reason of any negligence upon the part of said steamer "Transit" or the master or any officer, seaman, or other person in charge of, or engaged in, the navigation or operation of said steamer.

V.

This respondent admits that at and preceding the time of the collision in said cross-libel referred to, a heavy fog prevailed, as in paragraph V thereof mentioned, but denies that said "Transit" was at the time thereof, and or preceding said collision, proceeding through said fog at an unlawful rate of speed, or was being navigated without the master thereof being in his proper position, or without the necessary lookouts required by law, stationed on the bow and ridge, or bow or ridge [37] of said "Transit," or elsewhere, where said master or lookouts could have *have* unobstructed view and range of hearing. On the contrary, respondent alleges that said master, and all necessary officers, lookouts, seamen and others, at all places upon said vessel intended or prescribed by law, or maritime practice or custom, were stationed, and as set forth in the original libel herein attempted and described, fully sought for, and would have recognized, had any such recognition been pos-

sible during said fog, the place of anchorage or location of said "Fullerton," and endeavored, as far as possible, to avoid collision therewith. This respondent further denies that, by reason of any of the facts set forth in paragraph V of cross-libel set forth, the master, officers or crew of "Transit" well or at all knew the location or position in which said "Fullerton" was anchored, or that notwithstanding any such knowledge, or said fog, said master, or any person, officer or seaman, in charge of, or employed upon said "Transit," either negligently, or carelessly or otherwise, improperly navigated or operated same at any undue rate of speed, or caused same to collide with said barkentine "Fullerton." On the contrary, this respondent alleges that during the existence of said fog said barkentine had no officer, lookout, or person thereon, who regularly, or at any time during the continuance of said fog, as required by rules and regulations of the United States Government, or of the State of California, or in anywise by maritime customs or rules, sounded, at intervals, or at all, such signals, by lights, bells or otherwise, necessary to advise approaching vessels of the location [38] of said barkentine "Fullerton," and that by reason of such failure said steamer "Transit" was unable to discover her location until the time when she necessarily collided with her.

VI.

This respondent denies each and all of the allegations contained in paragraph VI of said cross-libel.

VII.

This respondent alleges that it is without informa-

tion thereon, and therefore denies that by reason of the collision alleged in said cross-libel, or any collision between said "Transit" and barkentine "Fullerton," said last-mentioned vessel was injured to cross-libelant's damage in the manner, or otherwise, or to the sum, or any sum, as in paragraph VII of said cross-libel set forth.

VIII.

But as to paragraph VIII of said cross-libel, this respondent denies that said or any collision was due to improper, careless or negligent management or navigation of said steamer "Transit," or was not, in any respect, due to any fault or negligence on the part of said barkentine "Fullerton," her officers or crew. On the contrary, this respondent alleges that said collision, or any damage resulting therefrom, was caused by fault or negligence on the part of said "Fullerton," her officers or crew, and by no fault or negligence whatsoever on the part of the master, officers or crew of steamer "Transit."

IX.

Except as heretofore admitted, all of the premises alleged [39] in said cross-libel are untrue, and this respondent therefore respectfully prays that said cross-libel be dismissed, and that it obtain and receive a decree for its costs and expenses herein.

SOUTHERN PACIFIC COMPANY.

By W. F. INGRAM,

Assistant Secretary.

J. E. FOULDS,

Proctor for Cross-libelant.

State of California,
City and County of San Francisco,—ss.

W. F. Ingram, being first duly sworn, deposes and says: That he is an officer, to wit, the Assistant Secretary of the Southern Pacific Company, cross-respondent herein; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

W. F. INGRAM.

Subscribed and sworn to before me this 5th day of January, 1911.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 17, 1911. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [40]

Minutes of Trial, etc.

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 17th day of January, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable FRANK S. DIETRICH, Judge.

No. 15,070.

SOUTHERN PACIFIC COMPANY,

vs.

The Barkentine "FULLERTON," etc.

This cause this day came on for hearing, L. T. Hengstler, Esqr., and E. J. Foulds, Esqr., appearing for libelant, and Ira A. Campbell, Esqr., appearing for respondent. Mr. Hengstler stated the cause to the Court and called Wm. H. Higginson Ernest D. Richelt, Richard M. Fahrenholtz, Harry A. Johnson, Phillip Olson, Olaf Wallon and A. Healey, who were each duly sworn and examined as witnesses on behalf of libelant.

Mr. Campbell called Robert Boys Hemming, Jr., who was duly sworn and examined as a witness on behalf of claimant, and introduced in evidence certain exhibits which were marked Claimant's Exhibits #2, 3, 4, 5, 6 and 7, respectively. The further hearing of this cause was thereupon continued until January 20, 1913. [41]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 20th day of January, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable FRANK S. DIETRICH, Judge.

No. 15,070.

SOUTHERN PACIFIC COMPANY,

vs.

The Barkentine "FULLERTON," etc.

Order Submitting Cause, etc.

The proctors for the respective parties being pres-

ent in open court, the further hearing of this cause was resumed. Ira Campbell, Esqr., proctor for claimant, called John Olsen, Alexander A. McAdie, R. B. Hemming, Frank Elwood Ferris, who were each duly sworn and examined as witnesses on behalf of claimant of barkentine "Fullerton." Mr. Campbell offered in evidence all depositions taken on behalf of said claimant.

Mr. Hengstler, proctor for libelant, recalled Wm. H. Higginson, who was further examined. The cause was then argued by respective proctors, and thereupon by the Court ordered that said cause stand submitted to the Court for decision. [42]

Testimony Taken in Open Court.

[Statements and Stipulations of Counsel Regarding Facts, etc.]

Mr. HENGSTLER.—If your Honor please, this is the case of a collision that occurred between the Southern Pacific car ferry "Transit" and the barkentine "Fullerton," on December 13, 1909. Some of the facts stated in the libel in Article 1 are denied by the answer, but I understand that Mr. Campbell, the counsel on the other side, will admit those facts, so that it will not be necessary to prove them. That is correct, is it not, Mr. Campbell?

Mr. CAMPBELL.—I have stipulated with Mr. Hengstler that we admit the allegations of paragraph 1 of the Southern Pacific libel, so far as they relate to the ownership or operation of the car ferry "Transit" and so far as respects the allegations of the

expenditure of money by the Central Pacific or Southern Pacific Railway Company.

Mr. HENGSTLER.—That leaves nothing that is denied in that article.

Mr. CAMPBELL.—No, except, of course, that we do not admit the amount or the cost of the repairs.

Mr. HENGSTLER.—No, that is understood.

Mr. CAMPBELL.—We admit all of the allegations of paragraph 1 except that the question of the cost of the repairs will be left to proof before the Commissioner in accordance with the usual practice. If the “Transit” is entitled to a recovery it eliminates all questions about the Southern Pacific being entitled to the money. Those are all the stipulations with reference to article 1.

Mr. HENGSTLER.—I suppose your Honor will probably follow the usual practice of this Court of referring the damages, if damages are found, to a Commissioner, so that it will not be taken up at this time.

The COURT.—Yes. [43]

Mr. CAMPBELL.—We might get all of the stipulations in the record at this time. Counsel for the Southern Pacific has stipulated with me an admission that the lights of the “Fullerton” were all right, and they were burning and proper.

Mr. HENGSTLER.—That they were brightly burning—in one respect I do not think I stipulated that they were all right, because in one slight respect they were not all right according to the testimony of your witness, as given in the deposition. The deposition itself showing that in a minor respect the

lights were not properly placed.

Mr. CAMPBELL.—Did you mention that to me yesterday when we were going over that?

Mr. HENGSTLER.—No; I did not notice that until I read the deposition in the meantime; however, we do not make a point that that has any bearing upon the collision itself, on the facts of the collision, except that it may have an indirect bearing upon the knowledge of the captain of the rules of collision.

The COURT.—The knowledge of the captain of what?

Mr. HENGSTLER.—Of the rules of collision.

Mr. CAMPBELL.—That is, the captain's knowledge of the law.

Mr. HENGSTLER.—The rules of navigation, the captain's knowledge of the rules of navigation. I will tell you now, Mr. Campbell, what my expectation is. The captain testified that the riding lights or anchor lights of the "Fullerton," while she lay at anchor in the bay were at a certain altitude; that shows they were not, as far as the height of the lights is concerned, properly placed under the rules of navigation. But I am perfectly willing to stipulate that they were burning brightly.

Mr. CAMPBELL.—That your vessel saw them?

Mr. HENGSTLER.—And that our vessel saw them. [44]

Mr. CAMPBELL.—Mr. Hengstler and I went over this entire matter yesterday at my office, and reached a definite understanding as to the stipulations, and this now is a new matter. If necessary I will produce the letter from your company admitting that.

Mr. HENGSTLER.—Admitting that they were burning brightly, that is the way we stipulated.

Mr. CAMPBELL.—I have that memorandum on my desk that was made in your presence.

Mr. HENGSTLER.—We will let the stipulation go in that modified form; we admit that the lights were burning brightly.

Mr. CAMPBELL.—Very well. If necessary I will prove it some other way.

Mr. HENGSTLER.—I cannot admit that the witness on the stand, the chief witness, the captain has already testified to, that they were not fixed at the proper height under the law.

Mr. CAMPBELL.—The witness in my judgment has not testified to that.

Mr. HENGSTLER.—If he has not, that will come out during the trial. Your Honor's attention will be called to his testimony during this hearing.

Mr. CAMPBELL.—But it is stipulated that they were burning brightly, that they were the proper lights and were lighted.

The COURT.—You admit that the lights were all right with the exception of their height, their elevation?

Mr. HENGSTLER.—Yes.

Mr. CAMPBELL.—The stipulation also includes the admission that the tide was flooding at the time of the collision, the tide was coming in at the time.

Mr. HENGSTLER.—That is stipulated. [45]

Mr. CAMPBELL.—The stipulation further includes the understanding that the most southerly line of the forbidden anchorage in San Francisco

Bay extends from the end of the 16th Street dock to the Southern Pacific Mole, is that correct?

Mr. HENGSTLER.—Being the line shown by the letters A-B.

Mr. CAMPBELL.—Yes, A-B on “Claimant’s and Cross-libelant’s Exhibit 1,” and that the forbidden anchorages shown on “Claimant’s and Cross-libelant’s Exhibit 1” is indicated by the lines E-G and C-E were not established at the date of the collision.

Mr. HENGSTLER.—They were established three days later, to be absolutely correct.

Mr. CAMPBELL.—Well, have it that way; but you do admit they were not forbidden anchorages at the time of the collision?

Mr. HENGSTLER.—Certainly.

The main facts and the admitted facts are these, you Honor: that the “Fullerton” was lying at anchor in the *neighborhood Mission Bay*. There will be some conflict in the testimony as to the exact spot where she was lying at anchor. The captain of the “Fullerton” in his deposition has testified that she was at the point which is marked “F” on the chart. While she was lying at anchor on the 13th of December, 1909, in the night-time, there was a collision between her and the car ferry “Transit” of the Southern Pacific Company, the “Transit” then being engaged in a trip from the Oakland side of the bay to the San Francisco side, from the Southern Pacific wharf on the Oakland side to the Mission Slip, the Southern Pacific Slip in Mission Bay on the San Francisco side. If your Honor cares, I will point those out.

The COURT.—I think I have got them in mind sufficiently.

Mr. HENGSTLER.—On that trip the Southern Pacific car ferry collided with the “Fullerton,” the “Fullerton” lying at that [46] time at anchor. I think it is also admitted that it was a very foggy night, that the fog was very thick at the time.

The COURT.—You needn’t go into that matter. I think I understand what the issue is. You may proceed.

[**Testimony of William H. Higginson, for Libelant.**]

WILLIAM H. HIGGINSON, called for the libelant, sworn.

Mr. HENGSTLER.—Q. Captain Higginson, how old are you? A. I am 64.

Q. What is your business?

A. Steamboat-man; master.

Q. What was your business on the 13th of December, 1909?

A. I was captain of the steamer “Transit,” Southern Pacific transfer boat.

Q. How long had you been the Captain of the steamer “Transit” at that time?

A. In the neighborhood of 10 years.

Q. And you still are the captain of that steamer, are you? A. Yes.

Q. You remember the occurrence on December 13th, 1909, when the collision happened between the “Transit” and the “Fullerton,” do you not?

A. Yes.

Q. About what time did the collision happen?

A. I left the Oakland pier with the steamer

(Testimony of William H. Higginson.)

“Transit” at 10:53, and the collision occurred, according to my log-book, the entry was made by the second officer, at 11:25.

Q. Under whose command was the steamer when you left the Oakland Slip?

A. I was in command.

Q. You mentioned, did you not, that these hours are in the night-time? A. The night-time, yes.

Q. You left the Oakland Slip at 10:53?

A. Yes.

Q. In the night-time? A. Yes. [47]

Q. What was the destination of the steamer at that time? A. Mission Bay Slip, 16th Street.

Q. How was the weather? A. Dense fog.

Q. Under what speed did the steamer “Transit” proceed on the trip across the bay?

A. Well, she was under a slow bell, that is, as close as we could shut her off without losing steerage-way. I should say, perhaps, 7 miles an hour; perhaps a little more or perhaps a little less.

Q. Who was at her helm? A. I was.

Q. Whereabouts on board of her were you?

A. I was on the starboard side of the pilot-house on the forward end of the boat, 100 feet from the bow or thereabouts.

Q. How high above the main deck of the steamer, about, Captain, was the pilot-house?

A. I should say about 20 feet.

Q. Was there anybody else in the pilot-house?

A. Yes.

Q. Who was there?

(Testimony of William H. Higginson.)

A. My first officer and the Assistant Pilot Fahrenholtz.

Q. Was there any signal given on the part of your steamer at the time?

A. Yes, we were blowing continual fog signals, one short blast at intervals of 30 or 40 seconds.

Q. Who sounded that signal?

A. The assistant pilot, Mr. Fahrenholtz.

Q. The man who was in your pilot-house with you?

A. Yes.

Q. What kind of a place is the pilot-house with reference to being shut in or open?

A. All open; glass all around.

Q. How was it at night during the trip?

A. The two front windows were open.

Q. Are they usually open, the two front windows?

A. Always when my boat is under way.

Q. Why?

A. So as to be able to see and hear, that is, I would [48] have to remark in foggy weather; we only have one open in clear weather, as a general thing, and that is the one in front of the captain, of the man at the wheel.

Q. You attended to the wheel yourself?

A. Yes.

Q. What was the first officer doing in the pilot-house?

A. He was on the port side with the window open; he was leaning out, in fact, right out in front with his hand on the sill.

Q. Leaning out of where?

(Testimony of William H. Higginson.)

A. Leaning outside of the pilot-house with his head to listen and see—to listen more than anything else.

Q. What was the third man doing?

A. He was standing between the wheels, blowing the signal, the fog-signal.

Q. Were there any other members, any other officers or members of the crew on the “Transit” during that trip?

A. The second officer was on the main deck.

Q. What was his duty at that time?

A. To see to it that he had his men placed in position on a lookout, for a lookout in the fog.

Q. Who was on the lookout?

A. There were four men besides the second officer, five on the bow right forward, in front of the cargo, box-cars.

Q. Where were they stationed?

A. Right on the bow.

Q. Could you see these men from where you were?

A. Some of them I could, but the others were shut off from the box-cars.

Q. How did you steer across the bay, by what method, Captain?

A. Well, my usual course that I had was southwest by south. On this occasion I kept her a little higher, because I was under a slow bell, perhaps a half a point higher, that is, southwest half south.

Q. Has the condition of the tide anything to do with your changing your regular course? [49]

A. It makes a difference of from 2 to 2½ points

(Testimony of William H. Higginson.)

on a compass, whether it is flood or ebb.

Mr. CAMPBELL.— $2\frac{1}{2}$ points, did you say, Captain? A. 2 to $2\frac{1}{2}$ points.

Mr. HENGSTLER.—Q. Did you hear or was there reported to you any whistle or any bell during the trip from the Oakland Mole to the San Francisco side?

A. Whistles were reported, but no bells.

Q. Whistles were reported?

A. Yes, but no bells.

Q. Was there any whistle in the immediate neighborhood or were they far-away whistles?

A. Well, they were right after we left the slip. We heard a whistle almost ahead. We considered it was the narrow-gauge boat, and I stopped my boat until I got my bearings, perhaps a minute, or maybe a minute and a half until I got my bearings, where that whistle was, and then I started up ahead again.

Q. What was the next whistle, if any, that you heard?

A. I heard whistles to the north of me, which probably were ferry-boats, but not in my way at all.

Q. Were there any lights reported at all?

A. Not before they reported the light of the barkentine "Fullerton." Prior to that time I had heard my slip-bell.

Q. Before the light was reported?

A. Before the light was seen.

Q. You heard the slip-bell? A. Yes.

Q. What do you mean by the slip-bell?

A. The bell that was rung on the end of the slip,

(Testimony of William H. Higginson.)

which rings on the dock, by the slip.

Q. You mean on the waterfront here in San Francisco? A. Yes.

Q. You heard that before the "Fullerton's" lights were reported to you? A. Yes.

Q. Who reported the "Fullerton's" lights?

A. The second officer, from the bow. It was his voice that I [50] heard reporting a light on the port bow close aboard.

Q. Will you tell the Court, if you please, what you did after that, within your knowledge?

A. I was watching my compass and making my course to the best of my ability when I heard the report from the bow "a light on the port bow close aboard." I looked up instantly and seen the light then, and I instantly shoved my helm to port and struck the jingle bell to go ahead full speed; and then I looked up again and seen there was no chance to avoid her, and at the same time I heard my first officer say "Stop her, Captain," and I did so; I rang the bell. At that time the light was over my jack-staff, and the first officer ducked down, he thought the jib-boom of this bark was going to catch the pilot-house, catch him, and he ducked to avoid it, and we landed right across her bow, and she took our smokestack out, and we got in under her jib-boom, and her jib-boom carried away our box-cars. I couldn't tell what damage she done actually right then, but we got a line on her and held on to her and drifted up the bay quite awhile; the weight of the boats carried the anchor along, made it drag, and

(Testimony of William H. Higginson.)

carried us out of that position.

Mr. FOULDS.—Q. What was the purpose of your ringing the jingle-bell—for full speed?

A. To try to avoid her, if there was any chance to make the boat swing past her, but the light was closer than I thought, and I thought the best thing to do, I knew the best thing to do would be to stop the boat entirely and keep from having too much speed on.

Q. How long, in a general way, was the interval between the time when you rang to go full speed ahead and the time you rang to stop?

A. It might have been 10 seconds or it might have been less, or it might have been more. It was a very few seconds, anyhow. You know in a case of that kind, why a man don't figure down [51] the exact time, he can only give it as a general thing.

Mr. HENGSTLER.—Q. Did I understand you to say that you saw the light of the "Fullerton" and you heard a bell at that time?

A. No; no bell.

Q. I was mistaken?

A. No bell. I seen his light, but no bell.

Q. You saw a light, but you did not hear any bell?

A. No.

Q. Were you watching for the bell yourself, to hear any bell?

A. I could have heard, but I could not see simply because my eyes were pointing to the compass; but I could hear anything that was going on. I heard our slip-bell.

(Testimony of William H. Higginson.)

Q. Were you listening for bells, whistles or signals?

A. I was listening for bells. We knew that the "Fullerton" was there in some position somewhere, but we thought on account of not hearing her bells that we were far enough to the northward not to hear it.

Q. At any time after the collision did you hear any bells besides the slip-bell, the Mission Slip-bell?

A. I lost the Mission Slip-bell after the collision. We drifted away from it and lost the sound.

Q. You lost even the Mission Slip-bell, you drifted away, drifted too far away to hear it after the collision? A. Yes.

Q. Did you hear the "Fullerton's" bell after the collision at any time?

A. Yes, after we made fast to her, then they started to ring the bell. I started to ring my bell first for fear of colliding with something else. I ordered my bell to be rung, and then the "Fullerton" started to ring her bell, too.

Q. But you did not hear the "Fullerton's" bell before the collision? A. No.

Q. And I understand you were listening for bells?
[52]

A. Distinctly; that is all we could go by, the sound.

Cross-examination.

Mr. CAMPBELL.—Q. Captain, what was the position of the "Transit" with respect to the "Fullerton" at the time you rang your full speed astern bell? A. Full speed ahead, you mean?

(Testimony of William H. Higginson.)

Q. The stop bell; you never reversed full speed astern, did you? A. No.

Q. Never backed your vessel at all? A. No.

Q. What was the position of the "Transit" with respect to the "Fullerton" at the time you rang your stop-bell?

A. I didn't ring any stop-bell—when I rang the stop-bell—I rang the jingle-bell first.

Q. What is the jingle-bell?

A. That is to go ahead full speed.

Q. I am asking you now, what was the position of your vessel with respect to the "Fullerton" when you rang the stop-bell?

A. 3 or 4 points on the bow; the "Fullerton" was right on my port bow. Her lights seemed to be right over the jack-staff when I seen the lights first.

Q. 3 or 4 points on the bow, was it? A. Yes.

Q. It was on your port bow?

A. Yes, a little on the port bow.

Q. But ahead of you? A. And ahead.

Q. You did not at that time reverse full speed?

A. No; stopped.

Q. Have you your log-book here? A. Yes.

Q. May I see it, please?

Mr. HENGSTLER.—There it is (handing).

Mr. CAMPBELL.—Q. I refer to the page of the log-book which is headed December 12 and 13.

A. Yes, you will see it is headed that way every 24 hours.

Q. Where does that run from?

A. That runs from 8 o'clock in [53] the morn-

(Testimony of William H. Higginson.)

ing of the 12th to 8 o'clock in the morning of the 13th.

Q. What do those figures on the left-hand side of the page represent, 196?

A. That is the number of the trip.

Q. The number of the trip?

A. Yes, the number of the trips that we make.

Q. Do you number a trip across the bay and back as one trip?

A. Across the bay is one trip and back is one trip. That gives the number of trips across the bay during the month.

Q. According to this log, then, you left Oakland Pier at 8:01 o'clock on the night of December 13th?

A. Yes.

Q. Look at the log. One minute after 8 you left Oakland Pier? A. Yes.

Q. And you arrived at the Mission Bay Slip at 8:40? A. Yes.

Q. And then you left Mission Bay Slip at 9:30 the same evening? A. Yes.

Q. And arrived at Oakland Pier at 10:24?

A. That is right.

Q. And then left the Oakland Pier at 10:50?

A. Yes, 10:53.

Q. Where are your courses indicated on the log?

A. They are not indicated on the log; we do not keep them that way.

Q. Have you any record of them at all?

A. No, not the courses; we don't keep them. We steer the same course year after year, day after day,

(Testimony of William H. Higginson.)

month after month, right along, the Ferry system.

Q. Were you on watch at the time you left Oakland Pier at 8:01 and got across to Mission Bay Slip at 8:40?

A. Yes, I was on watch, but I was not at the wheel on that trip.

Q. You were on deck, were you?

A. No, I was in the pilot-house. My first officer took her over across the bay.

Q. Who brought her back? A. I did.

Q. On the 9:30 trip? A. I did. [54]

Mr. CAMPBELL.—Will you consent to the use of this chart? It is one furnished by the State Board of Harbor Commissioners as a correct chart of the waterfront.

Mr. HENGSTLER.—I do not think it is drawn to scale, is it? You do not mean as far as the scale is concerned?

Mr. CAMPBELL.—No. I don't care anything about that.

Mr. HENGSTLER.—In its general features I have no doubt it is correct; it is an official chart?

Mr. CAMPBELL.—It is merely a copy of one you have.

Mr. HENGSTLER.—It is similar to it.

Mr. CAMPBELL.—You will admit that the anchorage which I mark with the two crosses was not established at the time of the collision?

Mr. HENGSTLER.—That is already admitted.

Mr. CAMPBELL.—That the southerly line of the

(Testimony of William H. Higginson.)

anchorage extended from the pencil-mark to the Oakland Mole?

Mr. HENGSTLER.—That the line you just drew is the line A-B.

Mr. CAMPBELL.—The line A-B on this chart, which I will ask to have marked “Claimant’s Exhibit 2.”

(The chart is marked “Claimant’s Exhibit 2.”)

Q. Now, Captain, I understand that you left the Oakland Mole at the point where there is a star, or did you leave at the Alameda Mole?

A. No, I left at the Oakland Mole. This is the slip here (pointing).

Q. You left from the slip marked with the figure 1 on “Claimant’s Exhibit 2”? A. Yes.

Q. Is that where you left from to go on this trip?

A. Yes.

Q. And your destination was where?

A. That slip there (pointing).

Q. At the San Francisco shore opposite the letter “A” on “Claimant’s Exhibit 2”?

A. Yes. You see this is the 16th Street Slip [55] here.

Q. The broken portion of the chart in the form of a wedge indicates the slip?

A. Yes, that is the slip.

Q. What was your course from the Oakland side of Mission Bay slip? A. Southwest by south.

Q. Southwest by south?

A. That is the regular course that we steer.

Q. At flood tide? A. Yes.

(Testimony of William H. Higginson.)

Q. What was the course you were steering that night? A. Southwest, about half south.

Q. You steer that course on the flood tide, and you had a flood tide on this night? A. Yes.

Q. Your regular course was southwest by south?

A. Yes.

Q. On this night you were steering a course southwest half south?

A. I was running on a slow bell; that made half a point to the north in order to make up for the slow time.

Q. The "Fullerton" was anchored some place to the eastward of the Mission Bay Slip, was it not?

A. Yes, from this slip here the "Fullerton" lay east northeast, perhaps 1,000 yards off. I don't know how far. I did not measure it. I got her bearings simply to avoid her in case of a fog.

Q. When did you take those bearings?

A. A couple of days previous when they came to the anchorage after the storm; the vessels had been blown around; we had a heavy southeast storm. I have not got the date of it, but it was 3 or 4 days previous to this collision, and in the meantime they had moved the Spreckels boats out and moved them up again, but whether the "Fullerton" was moved or not I don't know, but I took her bearings in order to avoid her. We always do that.

Q. To get this clear in the record—the "Fullerton" had been [56] anchored at some point approximately off Mission Bay Slip? A. Yes.

Q. Your San Francisco shore landing?

(Testimony of William H. Higginson.)

A. Yes.

Q. Sometime prior to the collision?

A. Yes.

Q. As a matter of fact, she had been anchored in that vicinity since September, had she not?

A. She had been anchored there quite awhile in that vicinity, yes.

Q. For 2 or 3 months?

A. I could not tell you. I know only about three days previous to this collision that she was there then.

Q. Do you mean to tell me the first notice you took of the "Fullerton" was three days before the collision?

A. Yes, because she was then in our fairway. I don't know whether it was three days; it might have been 3 or 4. It was after the storm was over.

Q. Had you ever taken notice of her before that?

A. I had seen her, but she was not where I had occasion to take bearings of her.

Q. You knew she was in that vicinity?

A. Yes.

Q. As a matter of fact, on several occasions in passing across the bay you had run so close to the "Fullerton" it was necessary for them to haul their boats in?

A. On the last 3 or 4 days she was in our fairway.

Q. Was it confined to that time?

A. It was confined to a few days before the collision, after the storm, after the southeast storm.

Q. At the time you say you took a bearing of her?

(Testimony of William H. Higginson.)

A. Yes.

Q. What was the bearing?

A. From the slip, where my boat lay in the slip, it was east northeast.

Q. From where your boat lay in the slip?

A. Yes. [57]

Q. Where was that bearing taken from?

A. From the pilot-house on the forward end of the boat.

Q. Which way does the slip lay?

A. The slip lays northeast and southwest.

Q. Northeast and southwest?

A. Yes; the slip lays that way.

Q. And this bearing was what?

A. East northeast.

Q. East northeast? A. Yes.

Q. So that the night that you left the Oakland Long Wharf, you had the bearing of the "Fullerton." You knew where she was?

A. I knew where she was when I left the day before, two days before,—we knew just about what her bearing was from the slip.

Q. Didn't you see her when you left the San Francisco side at 9:40 that night? A. Yes, I did.

Q. Where was she then?

A. She was still there in the same place.

Q. So when you left the Oakland Pier at 10:53, you knew where the "Fullerton" was? A. Yes.

Q. With respect to the Mission Bay Slip?

A. Yes.

Q. You knew that she had been anchored off that

(Testimony of William H. Higginson.)

Mission Bay Slip for two or three months prior to that time?

A. Well, I knew she was in that position only two or three days or three or four days.

Q. How far was she from that position during the two or three months?

A. I could not tell you. I did not take any notice at all; she was not in my fairway or near it; that is, not of sight but it was there, but she was not in my fairway.

Q. When you left the Oakland Pier you were in command, were you? A. Yes.

Q. And you were in the pilot-house? A. Yes.

Q. You were doing the steering of the vessel?

A. Yes. [58]

Q And you were navigating in a fog?

A. Yes.

Q. You were looking at the compass? A. Yes.

Q. And you were actually in the command of the ship at the time? A. Yes.

Q. And the only other navigating officer that was above the lower deck of the vessel was the first officer and the pilot? A. Yes.

Q. And the first officer was in the pilot-house with you? A. Yes.

Q. And the pilot was in the pilot-house with you?

A. No, no pilot; a man to assist the pilot.

Q. I thought you said assistant pilot. So that you were navigating this steamer across the San Francisco Bay? A. Yes.

Q. Where you knew that there are numerous

(Testimony of William H. Higginson.)

boats plying, didn't you? A. Yes.

Q. With no navigating officer outside of the pilot-house?

A. We had an officer outside of the pilot-house, the licensed officer outside of the pilot-house.

Q. Down on the main deck?

A. On the main deck.

Q. Forward of the freight-cars? A. Yes.

Q. Acting as a lookout? A. Yes.

Q. And there was not in command of this vessel a navigating officer outside of the pilot-house while you were crossing the bay that night in the fog? Was there or was there not?

A. There was no navigating officer outside of the pilot-house; they were in the pilot house.

Q. The second officer, he was down on the fore-deck? A. Yes.

Q. In front of these freight-cars? A. Yes.

Q. He was not in command of the vessel at the time, was he? A. No. [59]

Q. He was merely acting in the capacity of a lookout? A. That is right.

Q. Is it customary to have five men standing on watch as a lookout on sea-going vessels?

A. This is a ferry-boat.

Q. Why did you have the five lookouts?

A. There was five men on the bow; there was four men and the second officer, so as to be able to catch, either one of them, a sound or a light or see something.

Q. Is that customary with you?

(Testimony of William H. Higginson.)

A. On all ferry-boats.

Q. On your ferry-boats? A. Yes, all of them.

Q. Do the passenger ferry-boats maintain four men on the main deck?

A. I don't know how many they maintain; they can't have all of the crew. I can. I have no passengers to look after. They have 3 or 4 men on all passenger boats.

Q. Why is it necessary for you to maintain five men out on the fore-deck as lookouts?

A. Well, some one might see more than the other, or hear something of the kind.

Q. As a matter of fact, it is because your vessel is a side-wheel vessel, is it not? A. Yes.

Q. And her paddle-wheels make a great deal of noise, and her steam exhaust makes a great deal of noise? A. No, no noise.

Q. Don't the blowing off of the steam make a great deal of noise?

A. No; there is no pressure at all.

Q. Don't the blowing off of steam make a great deal of noise? A. No; she is a low-pressure boat.

Q. This boat is designed to carry freight-cars?

A. Yes.

Q. You take a train of freight-cars down on the vessel? A. Yes.

Q. How many tracks do you have? A. Two.

Q. So you are carrying two trains of cars?

A. Yes.

Q. And the deck of the vessel, how many feet is that above the water? [60]

(Testimony of William H. Higginson.)

A. Well, I should judge 8 feet—6 to 8 feet, according to the kind of load you have on.

Q. So that the lookouts, these five men, were down in the forward part of this vessel at a distance of about 8 feet above the water? A. Yes.

Q. Between them and your pilot-house were these freight-cars? A. Yes.

Q. So you could not see from your pilot-house the men on lookout?

A. I could see one man between the cars. I knew the others were there.

Q. Between the cars?

A. I could see one man between the cars.

Q. Did you ever see a group of five men together where there was not a conversation going on?

A. They did not stand together.

Q. Did you see them this night? A. No.

Q. You don't know but what a conversation was going on, do you?

A. I have an officer that will testify to that fact.

Q. I am asking about your knowledge.

A. Not to my knowledge; no.

Q. You think it necessary to maintain five men as lookouts because of the noise that the paddle-wheels made interfering with the hearing?

A. You couldn't hear the paddle-wheels forward.

Q. You couldn't hear them? A. No.

Q. Why was it necessary to maintain the five lookouts on this vessel then?

A. It is customary; that is all.

Q. It is customary? A. Yes.

(Testimony of William H. Higginson.)

Q. As a matter of fact, you could hear those paddle-wheels any place on board your ship, couldn't you? A. Well, you might and you might not.

Q. How was the wind blowing that night?

A. There was no wind blowing, it was foggy.

Q. Doesn't the wind blow when it is foggy?

A. Very seldom; it [61] was dead calm on this occasion.

Q. Are you saying that because of a recollection that it was, or are you giving your conclusion that the wind does not blow when it is foggy?

A. I am saying on this occasion there was not any wind on that evening; on that night there was no wind.

Q. How was the wind, if there was any, blowing?

A. When there is any wind you cannot tell anything about how it is because the boat going creates a wind of her own.

Q. The reason you say you had no wind that night is because you could not feel any breeze coming into the pilot-house? A. No.

Q. If you were running before the wind you would not feel it?

A. If there was any wind I would feel it more or less coming into the pilot-house.

Q. If there was a wind and you were running before the wind you would not feel it in the pilot-house? A. No.

Q. That night you did not feel any wind coming into the pilot-house? A. No.

Q. When you started from Oakland Pier was

(Testimony of William H. Higginson.)

there any fog? A. Yes.

Q. There was fog at that time? A. Yes.

Q. What kind of fog whistles did you blow?

A. One blast about—well, 3 or 4 blasts a minute; it might have been 3, it might have been less—well, about three, I guess.

Q. 3 or 4 blasts a minute? A. Yes.

Q. What kind of blasts? A. Short blasts.

Q. How long would a blast be?

A. Two seconds or perhaps 3.

Q. Is that what the law required for a fog signal?

A. The law don't require that the blast should be 3 or 4 or 2 seconds; it says a short blast of the steam-whistle.

Q. On this night you say in the usual course of navigating this vessel you left one window open in the pilot-house? [62]

A. In the daytime when it is clear or at night-time when it is clear one window open.

Q. What kind of windows are those?

A. There is three; the pilot-house is 12 feet or something like that square, and there are three windows on the front and three around on the side.

The COURT.—Q. You mean three on each side?

A. Three on each side of it.

Mr. CAMPBELL.—Q. This night you had lowered two windows instead of one? A. Yes.

Q. Were they down the full length?

A. The full length; the center window was closed.

Q. The center window was closed? A. Yes.

Q. You stood on the starboard side? A. Yes.

(Testimony of William H. Higginson.)

Q. Back of the wheel?

A. Between the two wheels.

Q. You stood between the two wheels?

A. There are two wheels, and I stood between them, perhaps $2\frac{1}{2}$ feet from the window.

Q. That is to say, she steers with steam-steering gear or hand steering-gear?

A. Steam steering-gear, and we have a hand-gear to assist us.

Q. That is, in the pilot-house there is a very large wooden wheel? A. Yes.

Q. With spokes on the outside? A. Yes.

Q. Of the same type as vessels' steering-wheels usually are? A. Yes.

Q. There is two of those? A. Two of those.

Q. They are situated about the center of the pilot-house, with respect to the sides? A. Yes.

Q. Nearer the forward end than the after end; is that true? A. About a foot from the window.

Q. The forward wheel is about a foot from the window? A. Yes. [63]

Q. What is the distance between the two wheels?

A. I should judge about $2\frac{1}{2}$ feet.

Q. That is about $2\frac{1}{2}$ feet? A. Yes.

Q. Where is the steam steering-gear?

A. Between the two wheels, about two feet from the window.

Q. You were standing between the two wheels at the steam steering-gear?

A. On the side right by the window, the steering-gear in my hand, a lever.

(Testimony of William H. Higginson.)

Q. That brought you back of the window about 21½ feet? A. Yes.

Q. Where was the compass?

A. Right in front of me, right up against the window, against the pilot-house.

Q. You were steering by the compass?

A. I was looking into it.

Q. You were steering by the compass?

A. Yes.

Q. What kind of a binnacle light did you have?

A. I have got a common oil light on the side.

Q. Throwing the light down on the face of the compass? A. Yes, on the compass.

Q. Your eyes were on this lighted part of the compass? A. Yes.

Q. These big car ferries are very hard to steer, aren't they?

A. They steer pretty good, considering they are large boats; they are slow to swing.

Q. A man has to be on the job all the time?

A. You have got to be on the job, got to watch her, keep her from swinging, especially across the eddies and currents.

Q. The tide was flooding pretty heavily that night? A. A strong flood-tide.

Q. There are a great many eddies in San Francisco Bay? A. Yes.

Q. And particularly as you approach the docks there are eddies? A. Yes. [64]

Q. So that a man who is attempting to steer a vessel, or even you are attempting to steer a vessel

(Testimony of William H. Higginson.)

by the compass, would have to watch pretty closely?

A. Yes.

Q. Otherwise the eddies would catch her and would swing her around in her course? A. Yes.

Q. Now, when you were coming across the bay, you heard a fog bell, didn't you?

A. When I got well over about 22 or 23 minutes—somewhere out there, I heard the fog bell.

Q. That was reported to you by your second officer, you say? A. Yes.

Q. Who reported it to you? Did the first officer?

A. The second officer; he reported it before I picked it up from the pilot-house, and I picked it up afterwards from the pilot-house.

Q. About that moment you saw this light?

A. No, I seen the light—we heard that prior to seeing the light.

Q. You heard this bell prior to seeing the light?

A. Yes.

The COURT.—The bell or the whistle?

A. The bell.

Mr. CAMPBELL.—Q. The bell? A. Yes.

Q. How long after you heard the bell did you see the light?

A. Well, I could not say; it might have been a minute—it might have been two minutes before the light was reported; it might have been perhaps 3 minutes before the light was reported to me. I could not tell exactly; I was not watching the time.

Q. This bell came from a point about ahead, did it not?

(Testimony of William H. Higginson.)

A. Right straight ahead it was reported—bell right straight ahead.

Q. Two or 3 minutes after you heard the bell you picked up this light?

A. They reported a light close aboard.

Q. At that time you knew it was the light of the "Fullerton," did you not? [65]

A. I did not know it was a light, but I thought it was.

Q. You knew where the "Fullerton" was, you expected the "Fullerton" to be right where that light was? A. Yes.

Q. You in your own mind concluded it was the "Fullerton"? A. Yes.

Q. You did not think it was anything else at that time?

A. No, not by the position of the steamer or by the bell ahead.

Q. When you saw this light of the "Fullerton," what was the bearing of your steamer by the compass—did you look at the compass at that time?

A. Heading southwest.

Q. Heading southwest at that time? A. Yes.

Q. Where was the light?

A. It was about, it looked to me about between 2 or 3 points on the port bow, right like that (illustrating).

Q. Your boat isn't sharp at the end? A. No.

Q. It is practically square?

A. Practically square; we get our bearings by looking over the end.

(Testimony of William H. Higginson.)

Mr. CAMPBELL.—Have you a picture of the boat?

Mr. HENGSTLER.—No.

Mr. CAMPBELL.—Q. This light was about over the port corner?

A. Over the port jack-staff; that is how we get our bearings, by the jack-staff.

Q. Where are the jack-staffs?

A. Right on the bow, one on each side.

Q. What do you mean by jack-staffs?

A. Well, a flag-pole; they are 20 feet apart.

Q. They are practically on what you call the forward port corner and the forward starboard corner?

A. Yes.

Q. This light was right over that port jack-staff?

A. Yes.

Q. And when you saw that light you rang full speed ahead? [66]

A. Yes, and put my helm hard-aport.

Q. You threw your helm hard-aport? A. Yes.

Q. What did you do next?

A. Then I stopped her—immediately rang two bells.

Q. Didn't you go under the full speed ahead bell at all? A. No time.

Q. Then you stopped her?

A. When I seen there was no chance to avoid her, I stopped her.

Q. But you did not back here?

A. I had no time to back here. I might kill the men in the engine-room if I did. I was looking out

(Testimony of William H. Higginson.)

for the men in the engine-room. If I had backed and my walking-beam had caught on that, it would have killed the men in the engine-room, sure.

Q. Why is that?

A. Because the walking-beam, going up and down, might have caught in the jib-boom and killed them in the engine-room.

Q. At the time you stopped you were right under her bow? A. Yes.

Q. Where was her bowsprit pointing?

A. She was laying right across like that (illustrating).

Q. Her bow was to the north?

A. To the north; yes.

Q. Whereabouts at the time you stopped her was her bowsprit pointing?

A. Right across the bow, right across my deck.

Q. When you stopped your engine?

A. She had not crossed then but it was close to us.

Q. What you have alleged in your libel is true, isn't it—let me ask you to listen to this, this allegation in your libel, see if it is not true: "that 3 or 5 minutes later the lookouts last above mentioned reported a light upon the port bow of said steamer 'Transit' and close aboard"? A. Yes. [67]

Q. "When her helm was put hard-aport and a signal given to her engineers for full speed ahead, trying to sheer off from any vessel indicated by such light." A. That is right.

Q. "But that it was then too late to avoid collision with the barkentine 'Fullerton' hereinafter described,

(Testimony of William H. Higginson.)

upon which said light was exhibited, the bowsprit thereof being not more than 2 or 3 feet back from the forward pilot-house of the 'Transit.' "

A. I could not tell you at the time the bell struck—when this bell, when this light was reported to me first I looked up from my compass and I saw a light right there. I could not tell how far it was off, and I rang the bell and shoved my helm hard-aport—rang the bell for full speed ahead. Then I looked down again and I seen that the light was too close aboard to avoid it, and I struck the bell to stop. My first officer said at the same time that I struck the bell to "stop her, Captain."

Q. At the time you stopped her, is it not the fact that the bowsprit of the "Fullerton" was practically over your deck?

A. Not at the time my boat was running ahead; at the same time when I struck the bell, it was not over the deck; when I struck the bell to stop it was not over the deck.

Q. How far off was it?

A. There was a dense fog; I could not tell you.

Q. You could not tell? A. No.

Q. At the time you stopped her where was the light on the "Fullerton"?

A. It looked to me close over the jack-staff when I struck the bell.

Q. Over the jack-staff? A. Yes.

Q. When you stopped her what did the flood tide do with your vessel?

A. The flood tide was carrying us on her.

(Testimony of William H. Higginson.)

Q. Which way?

A. It set her on top of the "Fullerton." [68]

Q. Captain, I want you to take these two models and lay them down in the positions in which the two vessels were at the time that you saw the lights of the "Fullerton."

A. Mark this one the "Transit." The "Fullerton" was lying here. I was steering southwest by half south, and I came along here and they reported this light here, and I cannot say how far off my jack-staff it was, but it was on the port bow, and I seen this light on her fore-rigging; her light was about there (pointing). It was back here about in the fore-rigging; it might have been on the top-gallant mast; if it was on the top-gallant one, it would be here, and if it was on the jib-boom it would be here (illustrating). I came along this way, you see.

Q. You did not understand the question. I asked you to take these two models and lay them in the positions the two vessels were when you first saw the light.

A. I should say in that position (illustrating).

Q. Is that correct now?

A. That is what I should say, these positions as near as I can remember them. That is how it looked like to me.

Q. Is this the position of the "Fullerton"?

A. She was lying heading nearly in that position.

The COURT.—He has already said that was the position.

A. To the best of my knowledge, that is the way

(Testimony of William H. Higginson.)

it looked to me.

Mr. CAMPBELL.—Q. Just mark on that the word “Transit,” now mark the position of the flag-staff.

A. There is a lookout here, one man here and one man there.

Q. This is north, is it? A. Yes.

Q. This is south? A. Yes.

Q. Now, how far distant would you judge yourself to be at the time that you saw the “Fullerton’s” light?
[69]

A. Well, the fog was so dense it could not be seen more than a couple of hundred feet anyway. I could not tell you just how far. You can’t gauge the distance in the fog; it is impossible.

Q. I am asking your best judgment.

A. Well, it might have been 200 feet, or it might not have been that much.

Q. It might not have been that far?

A. No, it might not.

Q. It might have been farther?

A. No, you could not have seen it much farther.

Mr. CAMPBELL.—I will ask to have that marked as “Claimant’s Exhibit 3.”

(The document is marked “Claimant’s Exhibit 3.”)

Q. Take the two models and put them in the position of the vessels at the time that you stopped your engine.

A. I stopped my engines at the time that I got in this position. I hung her up almost just instantly;

(Testimony of William H. Higginson.)

it may be 2 seconds or it may not be that much before I stopped her again. All I had time to do was to look up to see her.

Q. How many rudders have you on this boat?

A. One rudder on each end.

Q. A pretty big rudder? A. 12-inch.

Q. In navigating around the wharves in San Francisco where there are so many tide-rips you have to have a pretty heavy rudder to steer with, don't you?

A. Yes.

Q. They answer the rudder quite quickly, do they not?

A. Sometimes they do and sometimes they don't, according to the rip. The "Transit" did not answer her rudder very quickly; she is a boat 335 feet long and of broad beam.

Q. Didn't she respond this night when you threw her helm hard-aport?

A. She didn't have time; there was not time enough between the bells to respond or act. [70]

Q. In your judgment, can't you lay down on the chart here, the position of the two vessels at the time you stopped the "Transit," any different from what you have shown?

A. That is as near as I can come to it. I know when I seen the light it was on the port bow, but I could not tell you the distance because the fog was so dense, and I did not have time to do any signalling or anything else of the kind between the bells.

Q. Had you got your helm hard-aport before you stopped?

(Testimony of William H. Higginson.)

A. Yes, I shoved her over and struck the bell at the same time; swung it over just like that.

Q. How long does it take you to swing your helm hard over?

A. It might take two seconds to roll over, and it might take three, according to the strength of the resistance against it; if the boat was laying still, it would go flying over, if it was going through the water it would go over slowly.

Q. When these ferry-boats approach the slips, the ferry-boats with side wheels, they can run almost into the slip before they have to stop and back?

A. Some of them can.

Q. Is that true of your vessel?

A. No, you have to give her time.

Q. In what distance can you bring your vessel to a stop?

A. Well, from the time I slow, at about three boat-lengths of it, I run her under slow bell one length, and then run her under stop-bell for a couple of hundred feet, and then I go back the whole length of the slip, and go back hard to fully stop.

Q. As you usually run across the bay, in what distance can you bring your vessel to a stop?

A. We do not stop the engine right at the same time. I am answering it to the best of my ability right now. [71]

Q. I am asking you for the distance, how far?

A. Well, we will say between eight and 900 feet.

The COURT.—Do you mean in the case of an emergency where an attempt is made to stop as soon as possible?

(Testimony of William H. Higginson.)

Mr. CAMPBELL.—Yes.

A. Under full speed you can't stop her inside of almost three boat-lengths the way we stop.

Q. Running at 7 miles an hour in what distance can you stop her?

A. That is pretty near full speed,—between 800 and 900 feet, the way we stop in an emergency. If you stopped the engines and tried to back her, she will not; she will jam. We have got to slow the engine first so as to give her time to recover herself; she has low-pressure engines and don't answer very well; she will jam and not back.

Q. This night that you were approaching the San Francisco shore you heard this fog bell?

A. I did, on the slip.

Q. You say it was the slip? A. Yes.

Q. How far off do you usually hear that fog bell?

A. You can hear it 6 or 7 minutes off.

Q. The distance, I mean.

A. The distance, that is,—oh well, half a mile.

Q. It depends upon the density of the fog?

A. Oh, yes.

Q. As a matter of fact, the sounds in the fog are very uncertain? A. That is right.

Q. Sometimes a bell close at hand will sound a long distance off, will it not? A. Yes.

Q. Sometimes a bell a long distance off will sound close? A. If the fog is thin, yes.

Q. So that it is difficult to judge distance by sound in a fog? A. That is right. [72]

Q. Knowing the position that the "Fullerton" was

(Testimony of William H. Higginson.)

anchored in when you left the bay slip at 9:40 as you say, and not hearing her bell when you were coming back on the trip, on the 10:53 trip—

A. (Intg.) I did not hear any.

Q. (Continuing.) Wasn't there any query raised in your mind why that bell was not heard?

A. I thought I was far enough north of it not to hear it.

Q. How far to the north did you think you were?

A. Well, I thought I was far enough to the north to make the slip.

Q. I asked you how far to the north you thought you were. A. I couldn't tell you; I have no idea.

Q. How far do you think?

A. The course I was steering ought to have carried me a quarter of a mile to the north of her.

Q. Didn't you think you could hear the "Fullerton's" bell more than a quarter of a mile?

A. I don't know how far I could hear it.

Q. Didn't you have any idea that night as to how far you could hear the "Fullerton's" bell?

A. I did not. I did not know the density of the fog.

Q. Didn't the fact that you were not able to hear the "Fullerton's" bell raise a suspicion in your mind as to where you were?

A. It raised the suspicion that I was far enough to the north not to hear it.

Q. You did not for a moment suspect you were down in the vicinity of the "Fullerton"?

A. I did not.

(Testimony of William H. Higginson.)

Q. Then your conclusion as to the position in which your vessel was was not based upon the course that you were steering, but was based upon the absence of the bell of the "Fullerton"—you concluded you were to the north of the "Fullerton"?

A. Yes. [73]

Q. Because of the course you were steering or because you did not hear the bell, which?

A. Because of the course I was steering.

Q. Then you concluded you were to the north of the "Fullerton" not because you did not hear it but because of the course you were steering?

A. The course I was steering ought to have carried me clear of her.

Q. You concluded that you were to the north of the "Fullerton"? A. Yes.

Q. Because of the course that you were steering?

A. Yes.

Q. And not because you did not hear the bell?

A. I thought I was far enough to the north not to hear it.

Q. But you found you were mistaken?

A. I found I was mistaken.

Q. So you didn't know exactly the course you were on?

A. I didn't know exactly the course that I was on simply because I did not know quite the strength of the current on account of the fog.

Q. How many years have you been employed in crossing this bay?

A. I have been on the bay on ferry-boats for 33 years.

(Testimony of William H. Higginson.)

Q. In that time you have acquired a pretty accurate idea of tidal and current conditions in San Francisco Bay, have you not? A. Yes.

Q. How many times do you suppose you have passed in and out of Mission Bay Slip—how many times do you think you have passed in and out of Mission Bay Slip between September 20, 1909, and December 13, 1909?

A. Well, I passed in and out of that 3 or 4 times every other day, sometimes more; sometimes six trips in there in a watch.

Q. Will you indicate on the paper here the position of the two vessels after they came together?

A. They came together like that; that is, when I got on the [74] deck they were lying in that position, and they were working ahead.

Q. Put them in the position.

A. That is as near as I can make it. I got a line from my bow here to this bow here, and the first officer gave an order to put a line from here to some where around here, to hold them in position and to keep them close together.

Q. That is about the position?

A. Yes, that is as near as I can make out.

Mr. CAMPBELL.—I will offer that in evidence.

(The paper is marked "Claimant's Exhibit 4.")

Q. Mark on the "Transit" the position of your pilot-house. A. There, 100 feet from the end.

Q. Whereabouts is your smokestack?

A. I should judge about there, near about the center.

(Testimony of William H. Higginson.)

Q. A circle? A. Yes.

Q. Where is your after pilot-house?

A. It is on the other end.

Q. Where are your walking-beams?

A. It is right there.

Q. Mark them. A. Yes.

Q. Now, as a matter of fact, the bowsprit of the "Fullerton" carried out your smokestack, didn't it?

A. Yes.

Q. Is this the position of that?

A. This is the position when I got down on the deck; afterwards the smokestack was carried away by the vessels forging ahead and swinging.

Q. Show me on the next drawing the position in which they forged ahead.

A. They were forging ahead like this; they forged ahead in this way (illustrating).

Q. As a matter of fact, didn't they come around almost parallel? A. No. [75]

Q. In what position did they finally rest?

A. They rested in that position; it was just like that; there were lines from this bow and another line from this bow; the "Fullerton" took a line.

Q. Where was the bowsprit of the "Fullerton" with respect to your smokestack?

A. Right across the deck, just abaft the smokestack. That was where the bowsprit was, abaft the smokestack, that is where it stood. I have got no measurements for this, only am telling you how it looks to me.

Q. Would that be the position of the smokestack?

(Testimony of William H. Higginson.)

A. The smokestack would be about there.

Mr. CAMPBELL.—I offer that in evidence.

(The paper is marked “Claimant’s Exhibit 5.”)

Redirect Examination.

Mr. HENGSTLER.—Q. Captain Higginson, you did not intend to convey the impression, did you, that you kept five lookouts on the “Transit” at all times?

A. In foggy weather.

Q. You meant that? A. In foggy weather.

Q. In the kind of weather that existed that night?

A. The men all go forward, all the crew that are not occupied in other places.

Q. So the reason why you put so many lookouts in the bow of your vessel was the foggy weather, the thick fog?

A. The dense fog; yes. In case one man might hear something or see something more than the other.

Q. You spoke once or twice about a bell that you heard straight ahead; when you spoke of that you referred to the slip-bell?

A. Yes, on the pier-head.

Q. When you first perceived the light of the “Fullerton,” Captain, [76] how much time elapsed from the moment when you first perceived the light to the time when the vessels came together, in your opinion, generally?

A. It might have been 20 seconds; it might have been 30 seconds. It was a very short time, I know; that is all.

Q. At that time the vessels were very close together?

(Testimony of William H. Higginson.)

A. At that time they were so close together that there was no time to do anything only to stop the engines.

Q. Can you now, when you look back upon it, think of any maneuver that you could have made between the time when you saw the light and the time of the collision that you could have *been* made that would have saved the collision, saved the vessels from coming together?

A. No, there was nothing; they were too close together. There was not distance to do anything; there was not time to even back the engines without endangering the lives of the engineers.

Q. If the engines had been reversed would that have made any difference?

A. Not a particle. I don't believe they would have reversed; they might have.

Q. Now, Captain, when you drew these diagrams here, you did not want to commit yourself that that was the exact position of the vessels at any particular time?

A. No, I said as near as I could. It was a dense fog, and that is as near as it looks to me.

Q. Captain, if there had been any wind that night you would have known about it, would you?

A. Yes.

Q. Even if it had been a head wind you would know of it?

A. The wind would have kept the fog moving.

Q. Can you tell positively from what you perceived when you left and when you came on this side and

(Testimony of William H. Higginson.)

while you were in the pilot-house that there was no wind blowing that night? [77]

A. I know that there was no wind blowing when we left the slip at Oakland Pier, when we were lying still there; that was the only chance to find out if there was any wind or not; the fog drifted, it did not blow at all; it drifted down in a hurry.

Mr. FOULDS.—Q. Captain, you have testified a moment ago that you felt no wind whatever in the pilot-house. Do you mean no wind beyond the wind that you ordinarily feel from the motion of the ship, or no wind whatever?

A. There was no wind that I know of any more than what we created ourselves, which we do. We create a wind more or less all the time; whether there is any wind or not we create a wind. I don't think there was a wind blowing one way or the other either ahead of us or behind us, or anything of that kind.

Q. If you felt any wind, then, it was wind that was created by your motion?

A. Yes, that is what I calculate it was.

Q. Did you feel such a wind? A. No.

Q. Did you feel any wind that would have been created by your own motion?

A. I felt a little wind, that is what I mean. I just felt a draught of the air, that is all, no wind. The draught of the air, there is just a little draught always when there is two windows open, a draught circulating through the pilot-house.

Mr. HENGSTLER.—Q. Do you ever open the side windows of the pilot-house? A. Yes.

(Testimony of William H. Higginson.)

Q. When do you open those?

A. We open those when the wind is blowing. When there is no wind we close it because we can get the sounds inside the pilot-house better.

Q. That night you had them closed?

A. That night we had them closed because the sound comes better to us. If the side window is open it creates a wind, a draught. I would like to state that sometimes we open and close these windows two or three [78] times on a passage, for the special purpose of finding out how the wind is, how the draught is carrying.

Q. This bell that you heard, how did you know that was not the bell on the "Fullerton"?

A. Well, the "Fullerton's" ship-bell, according to the law, is rung in that manner (illustrating). Our bell rings like a locomotive bell.

Q. You mean the slip-bell?

A. The slip-bell; we can tell the different sounds of the bells.

Q. In characterizing this ship's bell, it has a quick, jerky motion?

A. Yes. In a fog it is supposed to ring for 5 seconds—more than that. A ship's bell is entirely different, a ship at anchor, the bell is different from any other bell.

Mr. CAMPBELL.—Q. Your vessel has a whistle that sounds something like a locomotive, you say?

A. Well, it is a hoarse whistle.

Q. In what sort of box is this bell on the dock inclosed?

(Testimony of William H. Higginson.)

A. It is inclosed in the rear and open in the front, a sounding-board behind it.

Q. A sounding-board with a flare-out, isn't it?

A. Yes, a flare-out.

Q. That flare-out points toward the Oakland mole?

A. It points right out from the slip; if you are either side of it you can't hear it very well; if you are right in front of it you can get the sound.

Q. That flare-out is toward the Oakland mole, isn't it?

A. It is right out from the end of the slip; it stands right up from the end of the slip.

Mr. HENGSTLER.—Q. Toward the Oakland mole?

A. No, not towards the Oakland mole, but it flares right out in front of the slip.

Mr. CAMPBELL.—Q. Doesn't it flare out parallel with the fairway [79] you are running on?

A. Not parallel, no, 'because we don't run altogether parallel; we have got to run with the tide; it would not do to have that bell parallel; if there was a flood tide, we would have to be more to the northward, and if an ebb tide to the southward, 2 points to 2½ points difference in our course. This course I am steering on, I have steered for over 10 years, the same course.

Q. As I understand it, you were blowing your whistle repeatedly, short blasts several times a minute?

A. Not several times; perhaps three times; we didn't figure on the minute, we were just blowing

(Testimony of William H. Higginson.)

them 25 to 30 seconds apart. I have got the man that blew the whistles; he will testify as to how he did blow them.

Q. I am asking you.

A. I am telling you 25 to 30 seconds apart.

Q. I thought you said 3 or 4 times a minute?

A. I might have said 3 or 4 times a minute; it might have been 3 or 4 times; that would be every 15 seconds—it might have been blown every 25 seconds.

Mr. HENGSTLER.—Q. How long did you say that the blasts are, Captain?

A. Between 2 and 3 seconds, the toot.

Q. It might be more than that?

A. No, very seldom, because our passing signals are longer signals.

[Testimony of Ernest D. Reichelt, for Libelant.]

ERNEST D. REICHELT, called for the libelant, sworn.

Mr. FOULDS.—Q. What is your age, Mr. Reichelt? A. 62.

Q. What is your employment?

A. I am first officer.

Q. On what steamer?

A. The steamer "Transit," belonging to the Southern Pacific Company.

Q. How long have you held that position?

A. Between 6 and 7 years. [80]

Q. Where were you on board the "Transit" on the 15th of December, 1909, on the trip shown in the log-book to have left Oakland Pier at 10:53 P. M.?

(Testimony of Ernest D. Reichelt.)

A. I was in the pilot-house, on the port side of the steering-gear.

Q. In what capacity were you acting?

A. As lookout, for any strange sound, occurrences or anything that should be in our fair way. I was listening for any kind of a noise. I had the window down and was leaning out of the window.

Q. Which window were you leaning out of?

A. On the left-hand side, the port side.

Q. Was it the side window or the front window?

A. No, the front window.

Q. Who was in charge of the ship at that time, in charge of the helm?

A. Captain Higginson; he was in charge at the wheel.

Q. Was there a lookout on the bow of the ship?

A. Yes, there was.

Q. Was the night clear or foggy?

A. It was very foggy, a dense fog. It was clear in the fore part of the night.

Q. But at all times during this trip that you left Oakland Pier at 10:53, at what speed had the vessel come?

A. We went ahead under a slow bell, half speed.

Q. Who was in the pilot-house besides yourself and the captain?

A. There was an apprentice pilot, Raymond Fahrenholtz, what you call the pilot-house man.

Q. What was his duty?

A. He was blowing the fog signals, the fog whistles.

(Testimony of Ernest D. Reichelt.)

Q. Who was on the lookout?

A. There were four deck-hands and the second officer—with the second officer.

Q. What positions were they in on the boat, in a general way?

A. Well, as a general rule, on a freight-boat or even on a passenger-boat [81] the lookouts are distributed half on the port side and half on the star-board side, and the officer of the deck is in the middle; that is, in case of any noise or any signals that he might hear, that he will report to the second officer and he will report to the pilot-house.

Q. Was that on the stern or the bow?

A. It is on the bow.

Q. What was the destination of the ship on that trip?

A. Going from Oakland Pier over to Mission Bay, the foot of 16th Street.

Q. Did you hear the fog whistle on the "Transit" on your own ship?

A. Yes, it was blowing every 30 or 40 seconds.

Q. Was that kept up constantly all the time?

A. All the way until we got in the collision with the "Fullerton."

Q. Was there any other ship reported in close proximity—was the sound of any other ship heard at close proximity?

A. Yes; about 2 or 3 minutes after we had started from Oakland we heard the sound of a steamer apparently crossing our bow, coming from Alameda mole crossing towards the city. He was blowing his

(Testimony of Ernest D. Reichelt.)

fog whistle and also the leaving whistle when he left the Alameda mole.

Q. What was the first indication on that trip that the vessel was nearing the San Francisco shore?

A. The sound of the slip-bell at the foot of 16th Street; that was the first indication that we were nearing the shore.

Q. Did you hear that yourself?

A. Yes, I did.

Q. Did you hear it distinctly?

A. Distinctly; yes.

Q. Were you familiar with that bell?

A. Very familiar with it.

Q. Was there any doubt in your mind as to what bell it was? A. No; no doubt whatsoever. [82]

Q. I presume you recognized it as the slip-bell; is that correct? A. Yes, I did.

Q. After that what happened?

A. It was only just about 2 or 3 minutes after that we heard the sound of the slip-bell that we located, our second officer reported a bright light on our port bow right on board, and immediately after the report was given I could see the bright light almost with the level of the pilot-house, about 3 or 4 points on my port bow. I was on the port side, it was nearest to me, and almost on the level with the pilot-house windows.

Q. How near was it in a general way?

A. Well, that is pretty hard to tell how near it was, but the distance was very short—I should say about 150 feet, maybe a little more, and it might be a

(Testimony of Ernest D. Reichelt.)

little less; it is a pretty hard thing in a fog, in a dense fog like that, to gauge the distance within a few feet.

Q. What signal was given to the engineer? Did you observe what signal was given to the engine-room?

A. Yes, I did. He was given the jingle-bell.

Q. Then what next?

A. The captain, he put his helm hard-aport and gave them the jingle-bell, and in the meantime when he gave them the jingle-bell, I seen the bowsprit of the "Fullerton" coming right for the pilot-house, and I told the captain, I said, "For God's sake, stop your engines entirely." We were right square across the "Fullerton's" bow, or the vessel's bow. I didn't say the "Fullerton's" bow, but the vessel's bow, and he gave them two bells in the engine-room; that means for to say to stop. Then the time was so short that I don't think the engineer had time to give half a turn or quarter of a turn on the engines.

Q. How did the ships come together?

A. The "Transit" went right across the "Fullerton's" bow, right [83] under the guard until she was pretty near amidships. Her bowsprit scraped over the whistle-wire that leads from the pilot-house to the funnel, and barely missed the front of the pilot-house where the three of us was in, the Captain, myself and the apprentice pilot.

Q. Right after you heard the Mission Slip bell did you listen for any other bell?

A. We always do in foggy weather; listen for any

(Testimony of Ernest D. Reichelt.)

noise, listen for any bells, fog-horn or whistle.

Q. You knew it in a general way, where the "Fullerton" was, didn't you?

A. We knew the "Fullerton" had been in the fairway or near the fairway, in a dangerous position in foggy weather.

Mr. CAMPBELL.—We move to strike out the conclusion of the witness. That is a question of law for the Court to determine.

The COURT.—You mean his statement about it was in a dangerous position?

Mr. CAMPBELL.—Yes.

The COURT.—It is allowed.

Mr. FOULDS.—We note an exception.

Q. What did you know about the position of the Fullerton with reference to your course?

A. Well, she was laying almost parallel with our slip, from our slip.

Q. What do you mean by parallel from your slip?

A. Well, right in front of our slip.

Q. Had you observed that she was near your usual course? A. How is that?

Q. Had you observed that she was near the usual course of the "Transit"?

A. Well, she had been in that position for 3 or 4 days probably.

Q. Did you hear any sound then from the "Fullerton" before the collision occurred?

A. No, I did not. [84]

Q. Did you hear any other bell except the Mission Slip bell?

(Testimony of Ernest D. Reichelt.)

A. Only the Mission Slip bell, that is all.

Q. You were listening particularly for the "Fullerton"?

A. No, I did not, I listened for any sound, what there might be coming from her or from any passing vessel or any vessel in our vicinity.

Q. After the vessels collided, what action did you take, what did you do?

A. I gave orders for to pass lines on to the "Fullerton" and secure her in the position she was in.

Q. When was the first time you heard the bell from the "Fullerton"?

A. After we had the lines out and we rang our own bell, she rang her bell, after she was secured.

Q. How long after the collision was it that they rang the bell for the first time?

A. How long after the collision?

Q. How long after the collision did they ring the "Fullerton's" bell for the first time?

A. After we rung our own, it might have been probably after the line was out, the bow-line and the stern-line—well, 4 or 5 minutes.

Q. What did you do after the collision?

A. We lowered a small boat, and I was sent ashore with four men in it and a compass to call for assistance for to clear the "Transit" from the "Fullerton."

Q. You went ashore, did you? A. Yes, I did.

Q. What did you do?

A. I went up to the office on the Mission Bay side and reported the accident to the officials there and asked them for to telegraph over to Oakland to send

(Testimony of Ernest D. Reichelt.)

a tow-boat, the "Ajax," over to assist us to get clear of the "Fullerton."

Q. What did you do next?

A. Afterwards I went back again on the "Transit," or on my way back I was trying to join my ship again, my boat. [85]

Q. Did you find the "Transit" and the "Fullerton" where you expected to find them?

A. No, I did not find them where I expected to find them. I thought I was sure of the course where I would most likely expect to find them, where I thought they were.

Q. I suppose you went to the position you left them the night before? A. Yes.

Mr. CAMPBELL.—Let him state what he did and not what you suggest.

Mr. FOULDS.—Q. Where did you find the ships?

A. I found them away to the southward, off the Sugar Refinery.

Q. How did you know they were down to the southward?

A. They could not be any other way, because the "Transit" was across the "Fullerton's" bow having the full force of the flood tide; there was a strong flood tide, and both vessels could not very well go against the tide; they had to go with the tide.

Q. Was there anything to guide you to the ships after you got to the position of the night before?

A. I had the compass in the boat with me.

Q. You got to the position of the night before and you saw the ships were not there; you knew they

(Testimony of Ernest D. Reichelt.)

must have gone south. Was there anything to guide you to the ships? Did you hear any sound from the ships?

A. Yes. I knew, I went a little to the southward because I knew they had been drifting to the southward; they could not go anywhere else, being bound together and only one anchor down that the "Fullerton" had; so I held her down to the south, south southeast by my course, that goes right up the bay, and after I maintained it a short while I heard the two bells distinctly, the "Transit's" bell and the "Fullerton's" bell, both of them was ringing, and that guided me back to the boat.

Q. Had you heard the "Fullerton's" bell at any time before that? A. No. [86]

Q. That was the first time?

A. That was the first time.

Q. What did you do next after you located where the ships were, in a general way?

A. I went back on board of my own boat again.

Q. How far was that?

A. Well, I should judge off the Western Sugar Refinery, the distance from where she was lying must be close up to half a mile; it might not be quite so far.

Q. You are sure that you heard the "Fullerton's" bell from the position that the ships were the night before? A. Yes.

Q. Could you hear the bell from the "Fullerton" while you were on shore? A. No, I could not.

Mr. CAMPBELL.—Q. Did I understand you to say you could hear the "Fullerton's" bell in the posi-

(Testimony of Ernest D. Reichelt.)

tion in which the vessels were the night before?

A. No.

Mr. FOULDS.—Q. In the position where the ships were the night before you could not hear the bells?

A. No.

Q. The next morning when you went back and got to the position the ships were when they collided, you could hear the bell of the "Fullerton" in a new position? A. I heard the two bells.

The COURT.—I did not understand the witness to mean to say that he went back to the exact spot where the collision took place; he said he steered a different direction, knowing that they would drift.

Mr. CAMPBELL.—South southeast; that is what I understood.

Mr. FOULDS.—I misunderstood him, then.

Q. What distance were you from the vessels when you first heard the bell of the "Fullerton" when you got back the next morning?

A. As I told you before, it must have been pretty near half a mile. I could not make much headway in a small boat in 2 or 3 minutes' pulling in that direction where the sounds of the bell were.

(A recess was here taken until 2 P. M.) [87]

AFTERNOON SESSION.

ERNEST D. REICHELT, cross-examination.

Mr. CAMPBELL.—Q. Mr. Reichelt, what do you mean by an apprentice pilot?

A. An apprentice pilot is a man that is learning the business, a young man that is learning to be a navigator in a steamboat.

(Testimony of Ernest D. Reichelt.)

Q. Who told this young man to blow the fog-whistle of the "Transit"?

A. The captain and myself.

Q. Every time he blew a blast on the fog-whistle would you tell him to blow it?

A. No; he knows that himself.

Q. He was doing that of his own initiative?

A. Yes.

Q. And he blew it when he wanted to and as often as he wanted to? A. No.

Q. Who told him how often to blow it?

A. Whenever I thought, you know, or the captain thought that it would be more than 30 or 40 seconds, or something near a minute, he would tell him, "Blow your whistle," or I would tell him.

Q. So that you and the captain in the pilot-house were from time to time telling this young man when to blow the fog-whistle?

A. Not exactly all the time.

Q. I mean from time to time you were?

A. Yes.

Q. Both you and the captain? A. Yes.

Q. Who handled the bells to the engine-room?

A. The captain himself.

Q. When the captain rang the bell to stop the engine, that was after you had told him to stop?

A. Yes.

Q. You told the captain to stop? A. Yes.

Q. Then the captain stopped?

A. He stopped; yes. [88]

Q. And at that time the bowsprit of the "Fuller-

(Testimony of Ernest D. Reichelt.)

ton" was pointing right towards your pilot-house?

A. Yes.

Q. The "Fullerton" was heading—how was the tide running?

A. The tide that was running was a flood tide from south southeast and north northwest—that is, the upper side points.

Q. Just take my pencil on this Claimant's Exhibit 2 and show me with an arrow which way the tide was running opposite the 16th Street dock.

A. This is the 16th Street dock.

Q. You are referring to the point marked "A"?

A. The tide was running this way.

Q. This is the land here, and this is the bay at your right? A. This is the bay here.

Q. You see these are the forbidden anchorages; here is Mission Rock. I want you to show me off the San Francisco docks the direction in which the tide was flowing.

A. Right along the shore here.

Q. You are away over on the Oakland side; this is the San Francisco side on the left? A. Yes.

Q. Now I want you to show me off the docks from the San Francisco side the direction in which the tide was flowing.

A. Here is San Francisco here.

Q. Maybe the larger chart will help you better; that is plainer to you?

A. Yes; it was running in this direction (illustrating).

Q. I want it down near the San Francisco side

(Testimony of Ernest D. Reichelt.)

here; you are off Alcatraz Island there.

A. Say from Goat Island in this direction.

Q. Just draw a long line through there to show the direction. We will mark that line "X-Y." That is to say, when the tide was flooding as it was that night.

A. Yes, that night. [89]

Q. The tide was practically running parallel with the San Francisco shore line? A. Yes.

Q. A vessel at anchor as the "Fullerton" was in that tide would have her bow pointing practically into the tide, wouldn't she? A. Yes.

Q. So that the "Fullerton" lying at anchor would be practically in a line parallel with the line that you have drawn there at X-Y? A. Exactly so.

Q. As I understood you to say, it was the rule on that car ferry to maintain five lookouts forward, the second officer and four men forward as lookouts.

A. That has always been the rule on them boats, on the freight-boat, everyone on the lookout.

Q. Have everyone on the lookout?

A. Everyone on the lookout on the boat, ever since I have been on the boat.

Q. That is, you mean by that that all of the crew who were not either in the pilot-house or the engine-room or the fire-room were on the forward part of the vessel as lookouts?

A. No, except the fire-room; they are not included. The engineer and fire department are not included on the lookout.

Q. But I say everybody else, all the rest of the crew? A. All the rest of the crew.

(Testimony of Ernest D. Reichelt.)

Q. Except the engine-room crew and those in the pilot-house are customarily stationed on the forward part of the vessel as lookouts? A. Yes.

Q. Have you ever been to sea in freight vessels?

A. Yes, I have.

Q. In what way?

A. In mostly sailing vessels.

Q. How many men is it customary to have on the lookout on sailing vessels? A. Only one.

Q. How many is it customary, if you know, on ocean-going steamships? [90]

A. On ocean-going steamships, as a general rule, in most of them or 90 per cent of them, they will have two lookouts.

Q. Two lookouts?

A. Two lookouts; one on the starboard and one on the port, that is to say, from the deck crew; also besides they have a quartermaster.

Q. The quartermaster is at the wheel, isn't he?

A. Not always.

Q. Where would he be stationed,—on the bridge with the master? A. Yes, very often.

Q. You do not call a man on the bridge a lookout, do you? A. No.

Q. You call a man who is stationed in the forward part of the vessel near the eyes a lookout?

A. Yes, that is right.

Q. It is customary to have two on those ocean-going steamers? A. Yes.

Q. What is your reason for maintaining five on board of this vessel?

(Testimony of Ernest D. Reichelt.)

A. Well, it was a rule, and we followed nothing else but the rule.

Q. Isn't the reason because of the noise that the paddle-wheels make, making it difficult to hear?

A. Well, as long as the boat isn't going very fast through the water, there isn't much chance to make no noise, you know.

Q. Going back to the question, isn't it a fact that in that particular vessel that these paddle-wheels make a great deal of noise and that is why you maintain the extra number on the lookout forward?

A. Well, I don't think that the "Transit" makes so much noise with her paddle-wheels.

Q. It makes considerable noise, don't it?

A. It makes a little noise; every boat makes noise, is bound to make a little noise.

Q. Was that the reason you took the extra precaution of having [91] so many men on the lookout?

A. It is because it is the rule.

Q. What is the reason for the rule on that vessel and not on other vessels—what was the reason for the rule on that vessel and not on other vessels?

A. Well, it is because it is on all vessels, on all freight-boats.

Q. What do you mean by all freight-boats?

A. What belong to the Southern Pacific Company.

Q. What are their names?

A. There is the "Car Float No. 2," and there is the "Solano," and there are other boats that go up the Sacramento that I don't know. I have never been in them.

(Testimony of Ernest D. Reichelt.)

Q. The "Solano" is a car ferry up at Port Costa?

A. Yes; they are also on the "El Capitan" the Vallejo Junction boat.

Q. They maintain five lookouts forward?

A. Just as many men as they can spare.

Q. All side-wheel steamers?

A. Yes, with the exception of "Car Float No. 2"; she is a stern-wheeler.

Q. What is the name of that boat?

A. "Car Float No. 2."

Q. Where is the pilot-house located on "Car Float No. 2"?

A. About 30 or 40 feet,—30 feet, I might say, from the bow—30 or 40 feet, somewhere around there.

Q. What course were you steering that night?

A. That I don't know, because I was not handling the wheel.

Q. After the collision you left and went ashore?

A. Yes.

Q. How long after the collision did you do that?

A. I went immediately, just as soon as we had the bow line and the stern line fast to the "Fullerton" to hold her in the position she was in.

Q. That took you some time, did it not, to get those lines out?

A. No, it did not take a great while, because the line is always handy, laying there on them boats, especially on the "Transit." [92]

Q. How long, in your judgment, would you say that it was between the time of the collision and the time that you were ready to go ashore?

(Testimony of Ernest D. Reichelt.)

A. About 10 minutes; somewhere around there.

Q. About 10 minutes?

A. About 10 minutes after the collision.

Q. How did you go ashore?

A. I went ashore in the small boat, the ship's boat.

Q. A rowboat? A. Yes.

Q. How many men did you take with you?

A. Four; three to row and one to steer—steer by the compass according to my direction.

Q. What was the compass course that you steered?

A. Southwest.

Q. You steered southwest? A. Yes.

Q. What is that—magnetic?

A. Magnetic compass.

Q. Whereabouts did you fetch up?

A. Fetched up on the oil wharf; that is, the second wharf above our slip.

Q. Above your slip? A. Yes.

Q. To the northward? A. To the southward.

Q. Where was that with respect to the 16th Street dock? A. Here is the slip (pointing).

Q. Mark it on this other chart. That is the one next to your ferry slip, the block marked below A?

Mr. HENGSTLER.—Here is the ferry slip, A.

A. Here is the ferry slip (pointing).

Mr. CAMPBELL.—Q. At the 16th Street wharf?

A. Here is the ferry; then comes the lumber company's wharf, and then is the oil wharf. There is the bay going to the Union Iron Works.

Q. Where does the south end of the forbidden anchorage extend from?

(Testimony of Ernest D. Reichelt.)

A. As far as I understand, it extended right from the lumber wharf—up from the oil wharf.

Q. You take this pencil and mark where this oil wharf was. [93]

A. There is the slip, there is the lumber wharf, and here is the oil wharf.

Q. The point marked oil wharf, how far was that oil wharf from your slip? A. About 200 feet.

Q. About 200 feet?

A. Or 250, somewhere around there.

Q. Who steered the boat,—did you, the rowboat?

A. No; the apprentice pilot by the name of Fahrenholtz.

Q. Did you watch the compass?

A. Yes, the compass was on the front of me.

Q. In going from the “Fullerton” to this slip you consider you steered a southwest course?

A. Southwest.

Q. Did they always hold her on a southwest course?

A. As near as we could; yes.

Q. What time did you go back to the vessel?

A. It was somewhere around one o'clock.

Q. About one o'clock? A. Yes.

Q. Where did you leave from, the oil dock?

A. The oil works, yes.

Q. You steered how?

A. I steered north by east.

Q. North by east? A. Yes.

Q. Magnetic, of course? A. Yes.

Q. How fast was the tide running at that time?

Mr. HENGSTLER.—What time?

(Testimony of Ernest D. Reichelt.)

Mr. CAMPBELL.—Q. At the time of the collision, I am speaking of.

Mr. HENGSTLER.—At the time of the collision—you were speaking of one o'clock in the morning.

Mr. CAMPBELL.—Q. I mean at the time of the collision.

A. Well, I should judge the tide was pretty strong, at that time.

Q. What is your best judgment?

A. About 6 miles; about 5 or [94] 6 miles; somewhere around there.

Q. How long did it take you to row ashore from the "Transit"?

A. Eight minutes or nine minutes from the "Transit."

Q. What time was it that you left the "Transit," what time did you leave?

A. Somewhere about a quarter to twelve.

Q. Did you look at your watch to see, or is that simply an approximation?

A. I looked at my watch going ashore.

Q. Do you remember now the exact time that you left and the exact time that you reached the dock?

A. No; that is just within my memory now.

Q. How did you happen to *take* the time how long it took you to go from the ship to the shore?

A. Because I know the running time of the boat, how long it took her before we was in line with the "Fullerton."

Q. At the time of this collision you had in mind pretty well the length of time that you had been run-

(Testimony of Ernest D. Reichelt.)

ning from the Oakland long wharf, did you not?

A. Yes, pretty near.

Q. You had seen the "Fullerton" anchored off the Mission Bay Slip or the 16th Street dock when you had gone to Oakland on the 9:40 trip, hadn't you?

A. Yes.

Q. So that when you left the Oakland Pier on this 10:53 trip you had in mind the location of the "Fullerton" with respect to your ferry slip, didn't you?

A. Pretty near it, yes.

Q. You had that mental picture as to where she was? A. Certainly.

Q. When this light came up out of the fog you knew pretty close where you were, didn't you—at least where you thought you were?

A. I did not know, because I was not handling the wheel. I was not handling the boat.

Q. Hadn't you been watching the compass course at all? A. No, I had not. [95]

Q. Was there anything that indicated to your mind that your vessel was running on a different course during all of the time, anything whatever to manifest that she had been running a different course?

A. No, I left it to the captain to steer.

Q. As you approached the time when you first saw the light of the "Fullerton" you knew pretty well about where you were, didn't you?

A. Well, yes, pretty near.

Q. Wasn't there any apprehension on your part of your not hearing the "Fullerton's" bell?

A. Well, no, there was not.

(Testimony of Ernest D. Reichelt.)

Q. The fact that you did not hear that bell and knew that vessel was in that vicinity, didn't it make you suspicious that you might be off your course?

A. No, I thought the road was clear, as long as we didn't hear any bell.

Q. What did you think had become of the "Fullerton"?

A. Well, that he was anchored far enough from us that she would not ring any bell.

Q. Is it customary aboard anchored vessels not to ring a bell except when other vessels are coming towards them?

A. When a vessel is approaching a vessel that is laying at anchor you always go to work and ring the bell.

Q. Doesn't the law require the ringing of the fog-bell at all times whether you hear another vessel or not in the fog?

A. It is, but it is very seldom carried out; they are not very often near where this boat was anchored; they are where there is no vessels coming.

Q. Didn't you wonder in your own mind whether or not you were getting close to the "Fullerton" before you saw the light?

A. Well, I couldn't say exactly that.

Q. Didn't you wonder why the "Fullerton's" bell was not ringing? [96]

A. I was wondering, yes, or some other vessels that were around there. I didn't hear no other bell.

Q. What other vessels were anchored in that vicinity?

(Testimony of Ernest D. Reichelt.)

A. There was a transport, I have forgotten her name; that slipped out of my memory; she was lying to the southward of us.

Q. Do you know the steamer "Lansing"?

A. Yes, I have seen her on different occasions.

Q. She was anchored right astern of the "Fullerton," was she not?

A. That I don't know. I can't remember any more.

Q. When you rowed in from the "Transit" to the dock, didn't you pass barges anchored between the "Fullerton" and the slip? A. Yes, lumber barges.

Q. It never occurred to you to stop the "Transit" and listen for the "Fullerton's" bell when you got down in the vicinity of where you expected to find her, did it?

A. Well, no, it was not in my mind, because I was not navigating the boat.

Q. The captain made no suggestion of that to you at all? A. He did not.

Q. He was busy steering with the compass?

A. Yes, steering the boat.

Q. Where is the Western Sugar Refineries that you speak of?

A. It is about half a mile to the southward from our slip, pretty near half a mile.

Q. Whereabouts is it with reference to the Union Iron Works?

A. It is further to the southward than the Union Iron Works.

Q. Further to the southerly than the Union Iron

(Testimony of Ernest D. Reichelt.)

Works? A. Yes.

Q. You say that the next morning that the "Transit" was anchored, or that the "Fullerton" was anchored off the Western Sugar Refineries?

A. I found her there after I came back with a small boat, after I went for assistance. [97]

Q. You found her anchored off the Sugar Refinery?

A. Pretty near off the Western Sugar Refinery.

Q. So that you had to row from this oil dock down past the Union Iron Works?

A. No, I went out first to the place where the collision occurred, or I thought pretty near where it occurred.

Q. I thought you told the Court this morning that when you went ashore that you thought that these vessels would drag their anchors and that when you left the oil dock that you steered a south southeast course. A. No, I beg your pardon.

Q. When was it you steered the south southeast course?

A. After I found out that the vessels were not there in the place where the collision occurred, and I thought they would have to drift to the southward; it could not be any other way.

Q. How long was it from the time you left the oil dock until you got back aboard your boat?

A. About 20 minutes; somewhere around there.

Q. Twenty minutes? A. About that; yes.

Q. You first rowed out to where the collision had taken place? A. Yes.

(Testimony of Ernest D. Reichelt.)

Q. That was on a north by east course? A. Yes.

Q. From that point you rowed south southeast?

A. South southeast; yes.

Q. Did you see the anchor lights of the "Sonoma" or the "Ventura" that night? A. No, I did not.

Q. Did you hear their bells? A. No.

Q. Did you know that they were anchored in that vicinity?

A. I know that they were to the southward of our slip; yes.

Q. You know, as a matter of fact, they were off the Union Iron Works, don't you?

A. Somewhere around in that neighborhood [98] either off the Union Iron Works or the Risdon Iron Works.

Q. Do you mean to say now that the "Fullerton" and the "Transit" dragged their anchors until they dragged to where the "Sonoma" and "Ventura" were anchored off the Union Iron Works?

A. Yes.

Q. Did you see the "Lansing" as you went down that night? A. No, I did not.

Q. Where were these barges anchored with respect to the Ferry slip?

A. Between the oil wharf and the Risdon Iron Works.

Q. Weren't they anchored between the "Fullerton" and the oil wharf? A. Yes.

Q. Then it was not the Risdon Iron Works and the oil works, was it?

A. Well, I mean to say in between the land, you know.

(Testimony of Ernest D. Reichelt.)

Q. The Risdon is to the southward of the Union Iron Works? A. Yes.

Q. Were these barges anchored between the oil wharf and the Risdon Iron Works, or were they anchored between the oil works and where the "Fullerton" and "Transit" came into collision?

A. Them barges was anchored between the shore; between the oil wharf and the Risdon, as near as I can come to it; there was not one, but there was probably 3 or 4. I don't remember how many; I didn't count them.

Q. Didn't you pass them in going in from the "Fullerton"? A. Did I pass one?

Q. Did you pass them in going in from the "Fullerton" to the oil dock?

A. Yes, I passed one of them in the fog.

Redirect Examination.

Mr. HENGSTLER.—Mr. Reichelt, you stated that there was a rule of the Southern Pacific Company with relation to your ferry-boats to have 5 lookouts. You mean in a fog, do [99] you not? You do not always have 5 lookouts, do you?

A. No, in clear weather we only have one.

Q. But this rule that you speak of that was in answer to Mr. Campbell's questions applies only to foggy weather, does it not? A. That is all.

Q. Was that rule in existence at the time when you entered the employment of the Southern Pacific? A. Yes.

Q. Do you know what the reasons for that rule are? A. I could not tell you.

(Testimony of Ernest D. Reichelt.)

Q. In your opinion, if you had been on the bow of the "Transit" that night when it approached the "Fullerton" and the "Fullerton" had struck her bells, would you have heard them? Would you have heard the bells? A. Most undoubtedly.

Q. Would you have heard them from the place where you were in the pilot-house if they had been struck? A. Yes.

Q. You were hanging out of the window there and looking about, were you not? A. Yes.

Q. And you were listening for bells? A. Yes.

The COURT.—He has been over that once; he has so stated.

A. I was listening for bells and whistles and any noises that might be made, different things in foggy weather.

Mr. HENGSTLER.—Q. Did any noise of the paddle-wheel interfere with your hearing any bells if there were any in the neighborhood?

A. No, not to any extent; it didn't amount to anything.

Q. When you went down in your boat after you left the oil works to find the "Transit" again, you passed in the neighborhood of the "Sonoma" and "Ventura," did you? A. No, I did not.

Q. You did not pass them? A. No. [100]

Q. You say you did not hear their anchor bells?

A. No, I did not hear any of them.

Q. You don't know, do you, as to whether their anchor bells were struck or not?

A. No, I do not; I did not hear any.

**[Testimony of Raymond M. Fahrenholtz, for
Libelant.]**

RAYMOND M. FAHRENHOLTZ, called for the libelant, sworn.

Mr. HENGSTLER.—Q. Mr. Fahrenholtz, how old are you? A. 24 years old.

Q. Where do you reside? A. In Oakland.

Q. Where are you employed now?

A. With the Key Route Company.

Q. Where were you employed on the 13th of September, 1909?

A. With the Southern Pacific Company on the car ferry "Transit."

Q. How long had you been employed there at that time?

A. Not quite a year; I don't remember the exact time.

Q. What was your capacity while you was there?

A. Deck-hand, and I was raised from deck-hand to apprentice pilot.

Q. Where were you stationed on the boat on the trip that left Oakland Pier for the Mission Bay Slip at approximately 10:53 P. M. on December 13, 1909?

A. I was stationed at the port side of the pilot-house of the steamer "Transit."

Q. Inside or outside? A. Inside.

Q. What were your duties?

A. Blowing the fog signals.

Q. What was the condition of the atmosphere?

A. Foggy.

(Testimony of Raymond M. Fahrenholtz.)

Q. Had you received any instructions about blowing whistles? A. Yes.

Q. What were your instructions?

A. Blow the regular fog whistles required by the United States Government.

Q. Had you ever done service in that capacity before? A. Yes. [101]

Q. How often did you blow the fog signals?

A. On an average of every 30 seconds.

Q. What was the manner of blowing the whistles?

A. A blast from 4 to 6 seconds.

Q. How do you know that you would blow it every 30 seconds? A. I counted it.

Q. You counted it; how did you count it?

A. Well, the way all navigators count it.

Q. How is that?

A. They count a second as 1-5, 2-5, 3-5, 4-5, 5-5, and so on.

Q. Would you continue counting and blow the whistles regularly according to that practice?

A. Yes.

Q. Did you have any other duties besides blowing the whistles?

A. No, not outside of listening for fog-bells or whistles.

Q. Did you hear any vessel in close proximity to the "Transit" on any time on that trip before it came near the "Fullerton"?

A. Shortly after leaving the Oakland side we heard one of the ferry-boats.

Q. Before the "Transit" struck the "Fullerton"

(Testimony of Raymond M. Fahrenholtz.)

did you hear the sound of any bell?

A. I heard the slip bell—the 16th Street Slip bell.

Q. Did you hear the sound of any ship's bell?

A. No.

Q. None whatever? A. No.

Q. What was the first impression before the accident that occurred as it appeared to you?

A. How do you mean?

Q. What was the first impression of the accident—what was it that occurred first?

A. Well, the lookout reported a light of the “Fullerton.”

Q. Did you see the ships come together?

A. Yes; I was in the wheelhouse. [102]

Q. How did they come together?

A. The tide set the “Transit” across the “Fullerton's” bow.

Q. The tide set the “Transit” across the “Fullerton's” bow? A. Yes, the tide.

Q. Was the ship under way at the time?

A. Yes, she had her headway.

Q. The headway ceased, then, at that time, did it?

A. The headway brought the “Transit” in front of the “Fullerton,” and the tide set the “Transit” on to the “Fullerton.”

Q. If it had not been for the tide she would not have hit the “Fullerton”; is that correct?

Mr. CAMPBELL.—Don't argue with the witness.

Mr. FOULDS.—Q. Was the night windy?

A. No.

Q. Were there any noises about the pilot-house

(Testimony of Raymond M. Fahrenholtz.)

that would prevent you, that you could not hear a noise in the vicinity? A. No.

Q. What was done, did you observe, immediately after the collision?

A. Lashed both boats together.

Q. When did you hear the fog-bell of the "Fullerton" for the first time?

A. The first time I noticed the fog-bell of the "Fullerton" was when we pulled back from the shore in the lifeboat.

Q. After the collision what did you do?

A. I got orders to go down on the deck to assist the other deck-hands in making her fast.

Q. After that what did you do?

A. Got orders to go in the lifeboat.

Q. Were you in the boat with the first officer?

A. Yes.

Q. Upon your return did you hear the sound of any fog-bell or any ship's bell before you saw the "Transit" and the "Fullerton" together? A. No.

[103]

Q. Did you hear any bells from those two ships?

A. Yes.

Q. Could you hear the bell from both ships?

A. I picked up the bell from the "Transit" first on account of being the largest bell—it carried farther; then we heard the "Fullerton."

Q. Did you observe in a general way where you were when you first heard the "Fullerton's" bell?

A. No.

Q. Could you see the "Fullerton"?

(Testimony of Raymond M. Fahrenholtz.)

A. No; not when we first heard the bell.

Cross-examination.

Mr. CAMPBELL.—Q. Where was the whistle-cord that you pulled? A. Right over my head.

Q. Right over your head? I don't understand about this counting 1-5, 2-5, and so on.

A. That is the way we count seconds.

Q. What do you do—do you count that way between the intervals of the blasts, or for the blasts?

A. No, between.

Q. Between the blasts?

A. Yes, between the blasts.

Q. That is, you stood there in the pilot-house and then after you blew a whistle you would say, 1-5, 2-5?

A. I would not say it; I would count it in my mind.

Q. You would repeat mentally to yourself, 1-5, 2-5, up to how far? A. To 30.

Q. Then you would blow? A. Yes.

Q. How long a blast would you blow?

A. 4 or 6 seconds; maybe 4 or 5 seconds; the law requires from 4 to 6 seconds.

Q. This fog was prevailing all the way across the bay? A. Yes.

Q. So that you stood there in the pilot-house mentally counting this 1-5, 2-5, from Oakland Long Wharf to the point of the collision? A. Yes.

Q. You have been told that that is the way that navigators do?

A. Yes, not only been told, but know it. [104]

(Testimony of Raymond M. Fahrenholtz.)

Q. What have you sailed on?

A. Sailed clear around the world, sailing ships and steamers; both.

Q. And they all count that way?

A. Yes, all navigators do.

Q. Did you have a clock in the pilot-house to go by?

A. The clock was over near the captain on the starboard side.

Q. As I understand you, the headway that the "Transit" had carried her across the bow and the tide set her down on to the bow of the "Fullerton"?

A. Yes.

Q. At the time that the tide set her down on to the bow of the "Fullerton" her engines had been stopped?

A. I could not say as to that; I don't know. I was not attending to the engines.

Q. Hadn't you heard the captain ring to the engine-room?

A. We don't always hear the ring on the sounding-tube.

Q. Haven't you got a telegraph?

A. We got a bell tube.

Q. Did you hear him pulling the bell?

A. I did not pay any attention to him pulling the bell. I could not say what he did with the bell.

Q. Yet you stood right alongside of him?

A. I stood on the opposite side of the wheel-house.

Q. You stood between him and the first officer?

A. I stood back of the first officer.

Q. Sort of to the side of him?

(Testimony of Raymond M. Fahrenholtz.)

A. The captain was over there and the first mate was there, and I stood in back of the first mate.

Q. From the pilot-house can't you hear the bells ringing in the engine-room?

A. They have a sounding tube; yes.

Q. That is for the purpose of enabling the men in the pilot-house to hear if the bell rings in the engine-room? A. Yes.

Q. Didn't you hear the bells ring in the engine-room?

A. No, [105] I can't say that I did. I did not pay any attention to them; they are not so loud as all that.

Q. Do you know whether he had rung the full-speed bell? A. No.

Q. Was there any apprehension on your part as to whether that vessel, your vessel, was running full speed ahead or beginning to stop when you saw you were going on to this vessel?

A. From the captain's experience, I had an idea that he had stopped her; that was the only thing that could be done.

Q. Weren't you afraid—wasn't there any apprehension on your part, any fear on your part?

A. For what?

Q. That you were going on the "Fullerton"?

A. Why, he was in such a position that he could not clear her.

Q. Were you the man who steered the rowboat from the "Transit" to the shore? A. Yes.

(Testimony of Raymond M. Fahrenholtz.)

Q. What course did you steer?

A. I don't remember the course he gave me.

[Testimony of Harry A. Johnson, for Libelant.]

HARRY A. JOHNSON, called for the libelant,
sworn.

Mr. FOULDS.—Q. Where do you live?

A. In Fruitvale.

Q. What is your age? A. 51.

Q. Where are you employed now?

A. By the Southern Pacific.

Q. Where? A. On the steamer "Transit."

Q. What is your capacity on the "Transit"?

A. Deck-hand.

Q. How long have you been on that vessel, in a general way?

A. I have been off and on of her, and on other boats. I have not been steady on her right along.

Q. Were you a deck-hand on the "Transit" on December 13, 1909? A. Yes. **[106]**

Q. Do you remember the trip upon which the collision between the "Transit" and the "Fullerton" occurred? A. I do.

Q. On December 13, 1909? A. I do.

Q. During that entire trip what was the condition of the night, clear or foggy? A. It was foggy.

Q. Where were you stationed on the "Fullerton" on that trip?

A. On the port bow—on the lookout.

Q. On the port bow? A. Yes.

Q. How were you stationed with relation to the freight-cars?

(Testimony of Harry A. Johnson.)

A. I was leaning up against a car listening for the sound of a whistle or a fog-bell.

Q. On the front or side?

A. On the side of the car, with my hand leaning over like that so as to get the sound from both places.

Q. On each side of the car? A. Yes.

Q. Were you leaning up against the car?

A. Like this (illustrating).

Q. Were you in a position where you could see in both directions?

A. See in both directions and listen in both directions.

Q. You were stationed as a lookout on the entire trip?

A. Yes; well, not the entire trip, because as soon as we came out I didn't have my oil clothes on. I went down to put my oil clothes on and there was a spar buoy there, and when we got up to the spar buoy I was out. I was out about 5 minutes after leaving the slip.

Q. Did you notice any vessels near that you reported on the way over?

A. We reported some ferry-boat coming out from the narrow gauge from the Alameda Mole.

Q. Did you notice any other vessels near?

A. Not at all. [107]

Q. Did you observe that the "Transit" was going full speed or going slowly?

A. Well, that is more than I can tell. She was not going the speed she generally runs.

Q. What is the first you saw immediately before

(Testimony of Harry A. Johnson.)

the collision occurred?

A. Before the collision occurred there was a light reported, an anchor light, at an angle like that from the bow.

Q. Did you hear any bell?

A. Only the 16th Street bell.

Q. You heard the 16th Street bell?

A. Yes, about one or two minutes. I could not say exactly how long before. We heard it and reported it to the pilot-house, reported it to the second officer and the second officer reported it to the pilot-house.

Q. Did you hear any ship's bell before that collision? A. No.

Q. None whatever?

A. Not before the collision.

Q. When was the first time you heard the ship's bell on the "Fullerton"?

A. After our bell was rung first, then they sounded the "Fullerton's" bell.

Q. Tell how the ships came together.

A. Well, so far as I could see, we were about half a point to the northward of her, or a point or so, and we didn't have headway enough to clear her, and I think after we stopped she must have drifted on her, and they went together.

Q. What were your duties at all times in going across on the ship as lookout?

A. I would look out when it was foggy weather, all hands would look out—the four deck-hands and second officer.

(Testimony of Harry A. Johnson.)

Q. What were your duties as lookout?

A. Our duty is to look out and listen for signals and report to the second officer and he reports to the captain.

Q. Did you do that all the time?

A. Yes, always. [108]

Q. Were you listening before this collision occurred? A. Yes.

Q. And up to the time the collision occurred?

A. Right until the collision occurred.

Cross-examination.

Mr. CAMPBELL.—Q. That was a very dense fog? A. It was.

Q. How long did it last?

A. Well, it lasted until after we got back to the “Transit” after being ashore; then it was clear after a little bit after we picked up the “Transit” and “Fullerton’s” bells.

Q. You got back to the “Fullerton,” and it cleared up? A. Yes, it cleared up after a little.

Q. What time was the “Transit” removed from there?

A. I never carried any watch and I couldn’t tell the time.

Q. What time were you taken away?

A. That is what I can’t tell you because I don’t carry no watch, and I never looked at any watch, because I have got lots of work to do, and when we have work to do we don’t have time to look.

[Testimony of Philip Olsson, for Libelant.]

PHILIP OLSSON, called for the libelant, sworn.

Mr. HENGSTLER.—This is one of the other witnesses, one of the members of the crew who was on the lookout on the port bow of the “Transit,” and we expect to prove by him the same facts that were proved by the preceding witness, and if counsel will stipulate that those facts are proved, that is that he was on the lookout, we won’t examine him.

[109]

Mr. CAMPBELL.—I am not going to stipulate that any facts are proved. I will cut down the examination as much as I can.

The COURT.—Proceed and get to the point of what occurred at the time of the collision.

Mr. FOULDS.—Q. What is your age? A. 51.

Q. Where are you employed now?

A. At the Southern Pacific, on the steamer “Transit.”

Q. What is your capacity? A. Deck-hand.

Q. What was your capacity on the night of December 13, 1909?

A. I was on the lookout on the port bow.

Q. Who else was on the lookout on the port bow?

A. Well, I didn’t see the rest of them. I was looking ahead all the time to see if anything came in the road of the “Transit.” I didn’t place them other hands.

Q. How many were there?

A. All hands got to be out foggy weather.

Q. Do you know how many there were out on the bow?

(Testimony of Philip Olsson.)

A. The next one to me was the second officer.

Q. Was there any wind that night? A. No.

Q. Was the night clear or foggy?

A. It was very foggy.

Q. Did you observe whether the ship was going fast or slow?

A. It went slow—slow speed, in my judgment.

Q. What were your duties as lookout?

A. To look after the dangers in the road for the “Transit,” ships or logs, or anything like that.

Q. Did you have to listen as well as to look?

A. Yes.

Q. Did you observe any dangers near?

A. No, not before we came out a little ways in the bay.

Q. What was that?

A. I saw a bright light on the port bow. [110]

Q. How long was that—was that some time?

A. About half an hour or so.

Q. Did you hear any ship’s bell? A. No.

Q. Did you listen for ship bells? A. Yes.

Q. Were you on duty all the time on that trip?

A. Yes.

Q. When did you first hear the bell from the “Fullerton”?

A. After we had made the “Transit” fast to the “Fullerton” and Captain Higgenson told me to go on the deck and ring the bell, after I rang it a few times, they began to ring the bell on the “Fullerton.”

Q. Did you hear any bell before you saw any lights on the “Fullerton”? A. No.

(Testimony of Philip Olsson.)

Q. Did you hear any shore-bell?

A. I heard the 16th Street bell.

Q. Tell us how the ships came together.

A. Well, the "Transit," it seems the tide took hold of her and drove her right down on the "Fullerton's" bow, broadside on the "Fullerton's" bow, on amid-ship.

Mr. CAMPBELL.—No questions.

[**Testimony of Olaf Wallon, for Libelant.**]

OLAF WALLON, called for the libelant, sworn.

Mr. FOULDS.—Q. Where do you reside, Mr. Wallon? A. Oakland.

Q. Where are you employed?

A. Southern Pacific steamer "Newark" at the present time.

Q. Where were you employed on the 13th of December, 1909? A. On the steamer "Transit."

Q. What was your capacity?

A. Deck-hand. [111]

Q. On the trip on which the collision occurred with the "Fullerton" where were you stationed, what was your duty?

A. I was on the lookout on the starboard bow.

Q. On the starboard bow? A. Yes.

Q. What were your duties as lookout?

A. To look for fog-whistles or fog-horns, to look around for anything that might be in the road, logs or anything like that, any noises we might hear.

Q. Was it foggy or clear? A. Very foggy.

Q. Was it windy that night?

A. No, it was not windy, not to speak of. As far

(Testimony of Olaf Wallon.)

as I can recollect, I don't think there was any wind.

Q. Did you see any vessels close by—did you report any vessel close by? A. I don't remember.

Q. Did you hear any ship's bell at all? A. No.

Q. All the way across? A. No.

Q. Until you came into the collision? A. No.

Q. Did you see the light?

A. I saw the light.

Q. But you heard no bell? A. No.

Q. Had you heard any bells from the shore?

A. No, not that I remember. I don't remember if I did.

Q. When you first saw the light was it pretty close?

A. Pretty close, yes, when I saw the light.

Q. If there had been a ship's bell as near as the light, could you have heard it?

A. Sure. Oh, yes, I could have heard it, before I saw the light.

Q. Do you think you could have heard the ship's bell from the "Fullerton" before you saw the light?

A. Oh, yes.

Q. How long before?

A. Five minutes before I seen the light. [112]

Q. Where was the light when you saw it first?

A. I don't know just about that. I was thinking it was up there—a little on the port bow like that (illustrating).

Q. How did the ships come together?

A. Well, I couldn't say very well. I was kept very busy at the time. The "Transit" went into the

(Testimony of Olaf Wallon.)

“Fullerton’s” bow and the bowsprit of the “Fullerton” hit on the smokestack and stopped there.

Cross-examination.

Mr. CAMPBELL.—Q. Were you trying to locate the “Fullerton” in the fog prior to the time when you saw the light? A. I don’t remember if I was.

Q. You knew you were approaching shore, didn’t you?

A. Well, I knew we were getting somewhere near on the other side, on the San Francisco side.

Q. Had you been on the lookout when you left on the 9:40 trip for Oakland Pier?

A. I don’t remember.

Q. You knew that the “Fullerton” was in the vicinity of the Mission Bay Slip, didn’t you?

A. Well, I knew she was laying somewhere around there.

Q. Weren’t you at all apprehensive because you had not heard her bell that night?

A. Well, I really didn’t think much about it.

Q. As a matter of fact, the “Fullerton” didn’t come into your head at all?

A. No, not at the time.

Mr. FOULDS.—We have the second officer of the ship here. He is an employee who was formerly in the employ of the company, but he is now pensioned, and is a very old man, and lives in Oakland, but since he has become pensioned, he has become very hard of hearing, and it will be troublesome to cross-examine him as a witness, and if the other side will waive [113] his examination, it will save the Court time,

(Testimony of Olaf Wallon.)

I think. The same facts will be testified to by him as was testified by the three or four deck-hands that we have.

Mr. CAMPBELL.—How long has he been hard of hearing—since December 13, 1909?

Mr. FOULDS.—I think he was slightly hard of hearing then.

Mr. CAMPBELL.—Are you willing to admit that?

Mr. FOULDS.—Yes.

Mr. HENGSTLER.—That he was slightly hard of hearing on December 13, 1909; yes.

[Testimony of Abraham Healey, for Libelant.]

ABRAHAM HEALEY, called for the libelant, sworn.

Mr. FOULDS.—Q. Mr. Healey, where do you reside? A. In Oakland.

Q. What is your age? A. 49.

Q. Where are you employed?

A. On the steamer "Transit."

Q. Were you employed on December 13, 1909, on the steamer "Transit"? A. Yes.

Q. What was your occupation at that time?

A. I was chief engineer.

Q. How long had you been employed at that time?

A. By the company?

Q. As chief engineer on the "Transit."

A. I had been about a year on the "Transit," I guess.

Q. Do you remember the trip shown in the log-book that we have been speaking about where the collision occurred with the "Fullerton"? A. Yes.

(Testimony of Abraham Healey.)

Q. When you left the Oakland Pier at 10:53?

A. Yes; I never [114] will forget that.

Q. During the entire trip what speed was given to the engines?

A. We were on a slow bell from the start to just a few seconds before the collision occurred.

Q. Did you have any interruption in the course—were you signaled to stop? A. Yes, one time.

Q. Where was that?

A. A little after we left the slip on the Oakland side.

Q. That is the only time?

A. That is the only time we stopped.

Q. Did you go at full speed at any time?

A. No.

Q. What was the speed?

A. With the exception of this time right after we seen the light, the captain gave me the jingle-bell. That means full speed ahead, and that was only a second—

Q. (Intg.) Then what signal was given?

A. Well, the ships were close together, and he gave me two bells; that is to stop her.

Q. Any further signals given? A. No.

Q. Did you obey the signals? A. Yes.

Cross-examination.

Mr. CAMPBELL.—Q. Have you the log-book?

A. Yes.

Q. Have you got it here?

A. No, the captain's log-book is here.

Q. Is your recollection of the time that elapsed

(Testimony of Abraham Healey.)

between your full-speed bell and your stop-bell based upon the log entries, or do you recall it this length of time?

A. I can recall it myself; I remember it.

Q. Were you handling the engine?

A. I was handling the engine myself. [115]

Q. What were your watches?

A. My watch was a 24-hour watch.

Q. 24? A. Yes, but I got an assistant with me.

Q. How many assistants have you got?

A. One.

Q. When did you stand watch, you did not stand the 24?

A. No, we didn't stand the 24; the assistant he takes from 12 till morning.

Q. From 12 o'clock at night?

A. Yes, till six in the morning.

Q. It is six hours on and six hours off?

A. No, we get 6 hours off out of the 24.

Q. You run from 6 o'clock in the morning until 12 o'clock at night?

A. In foggy weather we stay on 24 hours—no let-down at all. On those occasions I have my assistant in the room, and he assists.

Q. How long had you been working up to this time?

A. We went to work at 8 o'clock in the morning, and that was half-past 11, pretty near.

Q. You had been on duty all that time?

A. Yes; of course, I didn't handle the engine all the time, because the assistant helped. We handled

her trip about, and we would sit down and rest then.

Mr. HENGSTLER.—That is the libelant's case.

[Proceedings Had Concerning Excerpt from Log.]

Mr. CAMPBELL.—I should like to read out of the log as follows: “Departed from Oakland Pier at 5:43 P. M.; arrived at Mission Bay 6:27 P. M. Departed from Mission Bay 7:14; arrived at Oakland Pier at 7:52; departed from Oakland Pier 8:01; arrived at Mission Bay at 8:40; departed from Mission Bay at 9:30, and arrived at Oakland Pier at 10:24; departed from Oakland Pier at 10:53; collision 11:25.”

Mr. HENGSTLER.—I notice that the entry for that is not complete in the record. [116]

Mr. CAMPBELL.—All I have read from the log are the times of the trips.

Mr. FOULDS.—It is not a complete record of it.

Mr. CAMPBELL.—The statements here as to the explanation of the collision are self-serving declarations so far as you people are concerned, and I don't care to make them part of my case at all.

Mr. FOULDS.—We want the whole log. It is only a very small statement. Opposite the trip there is a notation: “Held for Orders on Account of Fog.”

Mr. HENGSTLER.—We ask that the entry for that day opposite to 10:53—11:25 P. M.—

Mr. CAMPBELL.—I object, if your Honor please, to their reading into this record a self-serving declaration from the log; they now propose to read a description of this collision entered by somebody. All I am asking for from the log is the time of the voyages.

Mr. HENGSTLER.—We appreciate that the weight of this as evidence is for your Honor to determine. Mr. Campbell has read a part of an entry of that date into the record, and all we offer it for is to make the entry for that day complete.

Mr. CAMPBELL.—Does that entry throw any light upon the time of the voyages?

Mr. FOULDS.—It throws light upon the time of the collision.

Mr. HENGSTLER.—It notes the time of the collision.

Mr. CAMPBELL.—That can go in, except that I am not consenting that you should read self-serving declarations into the record; I am not binding myself to the sufficiency of it.

Mr. FOULDS.—No. “11:25; drifted across the bow of the four-masted barkentine ‘Fullerton’; strong flood tide; [117] no bell rung or noise of any kind made to locate her position.”

Mr. CAMPBELL.—Who wrote that entry in the log?

Mr. FOULDS.—The second officer.

[Endorsed]: Filed Jan. 25, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [118]

*In the District Court of the United States in and for
the Northern District of California, First
Division.*

No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Libelant and Cross-respondent,

vs.

Barkentine "FULLERTON," Her Tackle, Apparel
and Furniture,

Claimant and Cross-libelant.

Deposition of T. A. Grant.

Be it remembered that on Tuesday, January 7th, 1913, pursuant to stipulation of counsel hereunto annexed, at the office of Messrs. McCutchen, Olney and Willard, in the Merchants' Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me Francis Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail, and affidavits, etc., T. A. Grant, a witness produced on behalf of the claimant and cross-libelant.

Ira A. Campbell, Esq., of the firm of Messrs. McCutchen, Olney & Willard, appeared as proctor for the claimant and cross-libelant, and L. C. Hengstler, Esq., and E. J. Foulds, Esq., appeared as proctor for the libelant and cross-respondent, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did there-

(Deposition of T. A. Grant.)

upon depose and say as is hereinafter set forth.
[119]

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of T. A. Grant may be taken *de bene esse* on behalf of the claimant and cross-libelant, at the offices of Messrs. McCutchen, Olney & Willard, in the Merchants' Exchange Building, in the city and county of San Francisco, State of California, on Tuesday, January 7th, 1913, before Francis Krull, a United States Commissioner for the Northern District of California, and in shorthand by Herbert Bennett.

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.) [120]

T. A. GRANT, called for the cross-libelant, sworn.

Mr. CAMPBELL.—Q. Were you master of the barkentine "Fullerton" on the 13th day of December, 1909? A. Yes, sir.

Q. When she was in collision with the car ferry "Transit"? A. Yes, sir.

Q. On San Francisco Bay? A. Yes, sir.

(Deposition of T. A. Grant.)

Q. How long had you then been master of her?

A. Since April 6th, 1909.

Q. Were you aboard at the time of the collision?

A. No, sir, I was not aboard.

Q. When did you go aboard of her following the collision? A. Between 7:30 and 8 in the morning.

Q. The next morning?

A. The following morning.

Q. Where was she when you boarded her the next morning with respect to the position that she had occupied when you left her last?

Q. She was further to the southward—let me see. I always get turned around in this bay. She rested over there (pointing); that would be farther to the northward.

Q. You had better get your chart.

A. (Contg.) No, it would be farther southeast, probably half a mile or three-quarters of a mile. As near as I can remember, she was to the southeastward of the position where I left her. I could not say how far, but I know she was out of position.

Q. Did you measure the distance? A. No, sir.

Q. When did you last leave her prior to the collision?

A. I left her about—somewheres around 5 o'clock in the evening.

Q. Of that day?

A. That same date. I forgot the date of the collision, the night of the collision. [121]

Q. The night before the collision?

A. Yes, sir, that same evening.

(Deposition of T. A. Grant.)

Mr. CAMPBELL.—I think it is admitted that the collision took place during the night.

Mr. HENGSTLER.—It might have been early the next morning.

The WITNESS.—No, it was somewhere about 11:30.

Mr. HENGSTLER.—Q. On the 13th of December, 1909? A. Yes, sir.

Mr. CAMPBELL.—It was in the night-time.

Q. Where was she anchored when you left her the evening prior to the collision?

A. About half a mile off the Union Iron Works and to the southward and eastward of the forbidden anchorage. I do not know just how far. That is only approximate.

Q. Are you acquainted with the car ferry "Transit"?

A. Well, I have seen her going by back and forth from the ship; that is all.

Q. What is she used for?

A. Ferrying cars across from Oakland.

Q. Where did she land on the San Francisco shore side? A. Somewhere around Sixteenth Street.

Q. What, if anything, did they have at the place where she landed?

A. I think they have lights there and a fog-bell.

Q. Was there a structure of any character?

A. They have a slip.

Q. Point out to me on this chart the ferry slip at which the "Transit" landed on the San Francisco shore side.

(Deposition of T. A. Grant.)

A. Somewheres in that vicinity there (pointing).

Q. Do you know?

A. I cannot tell exactly which it is; I should judge it was there (pointing). [122]

Q. Take a pencil and point to the place where you would say it was.

A. I should say somewheres in there (pointing).

Q. Mark on it the letter T.

A. Yes, sir. That is a new chart since that time.

Q. Where was she anchored with respect to the slip at which the "Transit" landed?

A. Somewhere up in here (pointing).

Q. Mark it with the letter F.

A. Yes, sir (marking).

Q. Where was that anchorage position with respect to the slip itself, that is to say, with respect to its being opposite, north or south?

A. South and east.

Q. South and east of a line drawn through the slip east and south.

A. It would be east approximately.

Q. Where would it be with respect to being north and south of it? A. It would be to the southward.

Q. How long had the "Fullerton" been anchored at that place?

A. September, October, November, and December. Approximately two months, I should say.

Q. When was she taken in there, do you recall?

A. September 20th, was it? It is so long ago I forget. Somewheres around September. The date of it I cannot say for certain.

(Deposition of T. A. Grant.)

Q. Had you been master of her during that time?

A. Yes, sir.

Q. Did she occupy the night before the collision the same position that she had been anchored in when she was originally taken there?

A. Well, within half a ship's length or so. You see, on the eastward they had to give her chain, on the southeast we give her all her chain and gradually heave it in again.

Q. If she did change her position from where she was originally anchored what would cause the change? [123]

A. The wind and tide.

Q. At the time of the collision were there any forbidden anchorage zones in San Francisco Bay?

A. Yes, sir.

Q. Where did the southern-most anchorage zone extend?

A. From Sixteenth Street across to the narrow gauge mole.

Q. Will you mark on the chart with the letter A the point on the San Francisco shore from which the forbidden anchorage zone started?

A. On this. That is Sixteenth Street there (pointing).

Q. And mark on the Mole side B.

A. Yes, sir (marking).

Q. Do you know whether or not the anchorage zone was a straight line drawn between the points A and B?

A. Yes, sir. I was shown a chart of the forbidden anchorage and I took the trouble to take the bearings

(Deposition of T. A. Grant.)

there when I was anchored there. I knew they would shift me if I was there.

Q. Were you ever required to shift by the State authorities? A. No, sir.

Mr. CAMPBELL.—With the consent of counsel I should like to draw a line between A and B if I may.

Mr. HENGSTLER.—I suppose he means that that forbidden anchorage is the zone which is shaded dark here from the point A to B?

The WITNESS.—Yes.

Mr. HENGSTLER.—Not the line itself?

Mr. CAMPBELL.—No.

Q. Where was the forbidden anchorage zone with respect to its being north or south of the line A-B?

A. It was to the north.

Q. Indicated on this chart, it is shown how?

A. In what way?

Q. How is it shown on the chart, the forbidden anchorage?

A. It is shown by the dark color—the forbidden anchorage [124] darkened.

Q. I will ask you whether or not there was a forbidden anchorage zone at the time of the collision as is now shown on the chart to the southward of the line A-B. A. No, sir.

Q. I will ask you whether or not there was at the time of the collision a forbidden anchorage zone which is now marked with the words, “forbidden anchorage,” which I underscored and marked with the letters C-D. A. No, sir; not at that time.

Q. I will ask you whether or not there was at the

(Deposition of T. A. Grant.)

time a forbidden anchorage zone shown on the shaded portions through which I drew the line marked E-G.

A. No, sir; not that I was aware of. That has come out new since they built the new slips at the Potrero.

Mr. CAMPBELL.—I desire to have the record show that this chart is corrected up to November 12th, 1912.

Q. What, if anything, if you know, caused the change in position of the "Fullerton" from where she was when you left her the evening before the collision and the place in which you found her when you boarded her in the morning?

A. The change was caused by the "Transit" striking her and the tide drifting her. After the "Transit" broke her propellor she lost control of herself; she was hanging on the "Fullerton's" anchor, and naturally she dragged, she made a sweep of the bay with the flood tide.

Q. Who anchored you in that position?

A. One of the red-stack towboats.

Q. What company owns the red-stack towboats?

A. The Shipowners and Merchants' Tugboat Company.

Q. When you left the ship on the evening prior to the collision, [125] who, if anyone, was left on board?

A. The engineer was left there to run the lights—keep the electric lights, you know—and the watchman.

Q. Anyone else?

(Deposition of T. A. Grant.)

A. The engineer's father was on board that evening.

Q. Do you know whether or not the vessel was equipped with a fog-bell?

A. The ship was equipped with a fog-bell and all that the law required in every way.

Q. What do you mean by that, "all that the law required"? A. All the law requires.

Q. What have you to say with reference to lights?

A. She had electric lights, riding lights; one aft and one forward.

Q. What was their condition with respect to the requirements of the law? A. They were perfect.

Q. Was there anything ashore at the point where the "Transit" landing which was used as a fog signal? A. Yes, sir.

Q. What was it?

A. It was a bell set in a box facing toward their route across the bay.

Q. And where did their route start from across the bay?

A. From that forbidden anchorage, you see where the ferries were passing back and forth.

Q. Where was the bell located on the San Francisco side?

A. It was in the slip, at the end of the slip.

Mr. HENGSTLER.—Q. What bell are you talking about now?

A. The Southern Pacific fog-bell for picking up their slip in the fog.

Mr. CAMPBELL.—Q. Was this fog-bell on the

(Deposition of T. A. Grant.)

slip at which she landed? A. Yes, sir.

Q. Were you ever aboard your vessel during the fog while she [126] was anchored there?

A. I dare say I have been. I have been there when it was raining, which makes about the same thing.

Q. Have you any recollection of ever having heard the fog-bell on the Southern Pacific slip ringing?

A. Yes, sir, I have heard it.

Q. Had you heard it prior to the time of the collision?

A. Yes, sir. Not on that day, you know, as the fog came up in the night.

Q. You were not there?

A. No, sir, but while I have been lying there I heard the bell.

Q. Had you ever seen the car ferry "Transit" come across the bay and land at the ferry slip?

A. I have never noticed it land. I have seen it pass by the ship.

Q. Which way coming and which way going on those trips?

A. One going to Oakland and one to the city on the east and southwest, approximately.

Q. How close would she pass to the anchored position of the "Fullerton"?

A. Sometimes she would pass within 100 feet of us when we would be lying to an ebb tide; she would pass within 100 feet of us, sometimes perhaps closer.

Q. Which way would she pass you—to the southward or northward? A. Northward.

Q. And when the tide was flooding which way

(Deposition of T. A. Grant.)

would she pass?

A. The same way, but she would keep further away from us. She would go to counteract the current.

Q. How far would she pass from you when the tide was flooding? A. I should say about a mile.

Q. And when the tide was ebbing?

A. She would come a little closer. [127]

Q. How many times a day would she pass over that route?

A. I don't know. I did know the engineer told me the time she would approximately pass us there. I forget now.

Q. What did the "Transit" carry?

A. Freight-cars.

Q. Where did she carry them?

A. She was a freight ferry and carried them on deck.

Mr. CAMPBELL.—I offer the chart in evidence and ask that it be marked Claimant's and Cross-libelant's Exhibit 1.

(The chart is marked "Claimant's and Cross-libelant's Exhibit 1.")

Cross-examination.

Mr. HENGSTLER.—Now, Captain, you said that the "Fullerton" had shifted her position between the time when you left her on the evening of the 13th at 5 o'clock and the following morning when you arrived on board at about 8 o'clock? A. Yes, sir.

Q. You have marked here on this chart, have you not, the position of the "Fullerton" as far as you understand it? A. As far as I understand it.

(Deposition of T. A. Grant.)

Q. That is approximate? A. Yes, sir.

Q. It might be nearer to the line A-B, might it not, or it might be farther away from the line A-B?

A. It might be further, but I do not think it would be closer to the line.

Q. You do not think it would be closer?

A. No, sir; at the time of the collision she was lying to a flood tide and she would be further away than she would be with an ebb tide. She would be lying to her anchorage at this way.

Q. Are you sure of that?

A. Yes, sir; it was flood tide. The weight of the "Transit" on her chain was too heavy to hold; [128] she naturally dragged with the tide to the south and east, so she shifted her position to the southward.

Q. Where do you think she was the following morning? Will you mark about the point on the chart?

A. She did not go so far because they gave her more chain.

Mr. CAMPBELL.—Q. Mark it with the letter F.

A. Yes.

Mr. HENGSTLER.—Q. That is the point, is it?

A. Yes, sir, approximately. It may have been a little further to the southward. It may have been further up here (pointing). I did not take particular notice.

Mr. CAMPBELL.—Q. Give it to us, Captain, as accurately as you can.

A. That would be about the position as near as I can tell (pointing).

(Deposition of T. A. Grant.)

Mr. HENGSTLER.—Q. What would you judge, Captain, was the position of the “Fullerton” to the line A-B in the evening when you left, in miles or fractions of a mile?

A. She would not be in exactly the same position when I left as she was when the accident happened, because when I left she was laying to an ebb tide and when the accident occurred she was laying to a flood tide. She was laying with 45 fathoms of chain out.

Q. When you left what distance would you say in miles she was from the line A-B?

A. About a quarter of a mile.

Q. At the time of the accident you would say she was further than 45 fathoms?

A. That would be 270 feet just by swinging. The ship was 200; that would be approximately. The bow would take about 45 fathoms, 270 feet further from the line when the accident happened than she was when I left the ship.

Q. That 300 is making an allowance for length of cable? [129] A. Yes, sir.

Q. The stern of the ship would be 500 feet?

A. That would be doubtful. If she was laying 45 fathoms down that would be the double length.

Mr. FOULDS.—Q. How deep was the water? You take into consideration the depth of water?

A. It would be only about three or four fathoms.

Mr. HENGSTLER.—Q. The distance from the stern of the “Fullerton” at the time when you left her the evening before to her stern at the time of the collision you estimate to be about 1,000 feet?

(Deposition of T. A. Grant.)

A. 800, because we do not know how much wind there was at the time, or whether the chain was taut or slack hanging in the sea.

Q. 800 feet? A. Say 800.

Q. How far was the "Fullerton" from the slip from the Southern Pacific slip on the evening when you left the "Fullerton"?

A. I should judge about three-quarters of a mile; between half and three-quarters of a mile. It is kind of hard to estimate distance two years afterward; you forget all about it.

Q. We want your best recollection at this time, Captain. Was she lying closer to the Southern Pacific slip than to the Union Iron Works or farther away?

A. No, sir, she was closer to the Union Iron Works.

Q. Closer to the Union Iron Works?

A. Yes, sir; that is the outside berth of the Union Iron Works.

Q. Whereabouts on this map is the Union Iron Works?

A. The Union Iron Works is here (pointing).

Q. Mark the place where you say the Union Iron Works is with a capital U.

A. Yes, sir; that is the outside berth (marking).

Q. And you say the "Fullerton" at that time was closer to the [130] Union Iron Works than she was to the slip? A. Yes, sir.

Q. Had the "Fullerton" changed her position from the day when she was anchored there to the day of the collision?

(Deposition of T. A. Grant.)

A. I do not know if she shifted any, only the length of the chain back and forth,—a 45-fathom *change*.

Q. You could not tell if she shifted or not?

A. No, sir; she had not shifted for the last month or so because I had the bearings. When it was blowing a gale of wind she had two chains down so they don't foul, and after the gale we take in the anchors. In a gale of wind she has more chain and both anchors.

Q. Any other vessels anchored near you at any time?

A. Yes, sir; one of the associated boats used to anchor just here (pointing) to the southward and westward of us.

Q. One of the Associated Oil boats? A. Yes, sir.

Q. What one was that?

A. The "Chancellor," if I am not mistaken.

Q. To the southward and westward of you?

A. Yes, sir.

Q. At what place? Will you mark it on the map?

A. Approximately in there somewhere (marking).

Q. At the point "G"?

A. Then there is other ships anchored in here (pointing).

Mr. CAMPBELL.—Q. You say to the southward and westward. Is the point marked "G" to the south or north—which?

A. It would be south of west anyhow.

Mr. HENGSTLER. — Q. More westerly than southerly?

A. Yes, sir, pretty near west, I guess. I know

(Deposition of T. A. Grant.)

there were vessels anchored at times closer in to the forbidden anchorage than we were.

Q. Was the "Chancellor" anchored in that position on December [131] 13th, 1909?

A. I could not say.

Mr. CAMPBELL.—You mean at the time of the collision?

Mr. HENGSTLER.—Yes.

A. I do not know if she was there that night or not. I do not think she was.

Q. But you do not know?

A. No, sir, not for certain.

Q. How far away was she from you when she was there?

A. We do not anchor within one-fourth of a mile of a ship if we can possibly help it.

Q. That is a general rule?

A. Yes, sir, we give them all the room we can.

Q. I asked you how far away, in your best judgment, was she actually from the "Fullerton" when she was anchored there?

A. I say about one-fourth of a mile.

Q. Do you say that as a fact or do you say that on the principle that it should be one-fourth of a mile?

A. I do not say that as a fact, because I do not know. I know the ship was anchored there. I did not take no notice whether it was one-fourth or one-half of a mile.

Q. She might have been one-fourth of a mile?

A. One-fourth of a mile, I should say. As a rule, they do not stop long. They come there for a few

(Deposition of T. A. Grant.)

hours; maybe all night. As a rule, they do not stop long.

Q. You were there two months?

A. We were not in commission.

Q. During all the time you were laid up did you have any dealings with the Harbor Commissioners at all? A. No, sir.

Q. Were you notified at any time to change your position? A. No, sir.

Q. Not during the whole time?

A. No, sir, not during the whole [132] time we were there.

Q. When was this forbidden anchorage which is south of the line A-B prescribed by the Harbor Commissioners, do you know, Captain?

A. I do not know. About 6 months ago in towing into the Union Iron Works I noticed the position of the ships lying in there had been altered, so I asked the captain of the towboat about it and he said they had a forbidden anchorage there after making this new slip at the Potrero. I knew they were going to make a forbidden anchorage, but I did not know they had.

A. Are you certain, Captain, that the line A-B was the southern-most boundary of the forbidden anchorage at the time when this collision took place?

A. Yes, sir.

Q. And it is correctly shown on this map, is it?

A. Yes, sir.

Q. You have examined it and you are sure about that?

(Deposition of T. A. Grant.)

A. Yes, sir, that was the limit of the forbidden anchorage there at the time.

Q. Now, there was on board when you left on the evening before, you say, the engineer and the watchman?

A. Yes, sir, and the engineer's father, but he had nothing to do or was he connected with the ship.

Q. The engineer's father is not a member of the crew? A. No, sir.

Q. He was just visiting his son? A. Yes, sir.

Q. Do you know if he stayed there overnight?

A. Yes, sir.

Q. Was he there the following morning?

A. Yes, sir, he was there.

Q. What is the engineer's business when the "Fullerton" is at anchorage?

A. He had the night watch as watchman, as he had [133] to run the electric lights. He was the engineer.

Q. He was in charge of the lights?

A. Yes, sir, and was watchman. He was watchman and engineer on the night watch.

Q. He was watchman and engineer at the same time? A. Yes, sir.

Q. What was his name? A. Thomas Hemming.

Q. Is he with the "Fullerton" yet? A. No, sir.

Q. Do you know where he is?

A. Mr. Fullerton told me yesterday that he was up in the country somewhere. I do not know exactly where.

Q. What was the name of the other man on watch?

(Deposition of T. A. Grant.)

A. Olie Olson.

Q. What was his position on the "Fullerton"?

A. He was a sailor acting as watchman.

Q. He was a sailor on board? A. Yes, sir.

Q. Was he a member of the crew? A. Yes, sir.

Q. What do you mean by he was acting as watchman?

A. He was day watchman. We put the engineer on the night watch because if anything happened to his lights he could fix them. The other man at that time, I do not know if he knew how to run the lights.

Q. Had you instructed Olson to act as day watchman? A. Yes, sir.

Q. You appointed him to that duty?

A. Yes, sir; I appointed him.

Q. Do you know if he went ashore in the night-time?

A. No, sir, he was not ashore that night; he was on board.

Q. How do you know?

A. Because he was there when I got there in the morning and the engineer told me that he came on deck when the accident occurred and helped him to get lines to the "Transit."

Q. You only know that from what you were told. You do not [134] know that of your own knowledge?

A. As a certainty he never stopped ashore at night.

Q. As a certainty, you say? A. Yes, sir.

Q. You are not aboard the "Fullerton" in the night-time much, are you?

(Deposition of T. A. Grant.)

A. No, sir, I was only aboard the ship when it was blowing. In fine weather I usually go home.

Q. Did you stop there all night when it was blowing? A. Yes, sir, several nights in succession.

Q. You had instructed this man Olie Olson to act as watchman during the day? A. Yes, sir.

Q. Is the engineer required to be there during the daytime?

A. No, sir; but it is such a hard position to get back and forth from that they generally stop there for weeks, just long enough to go ashore and get something to eat.

Q. There was nothing to prevent him from going ashore? A. No, sir.

Q. He had no duty to perform during the daytime?

A. Just to sleep.

Q. And Olson slept at night and the other man during the day? A. Yes, sir.

Q. What kind of a fog-bell did you have on board?

A. The ordinary regulation fog-horn.

Q. What do you mean by that, Captain?

A. They have a bell on every ship. The law requires them to put a bell aboard the ship. They put a bell aboard the ship. We had a fog-bell.

Q. You do not know what kind of a bell the law requires? A. The law says a fog-bell, or fog-horn.

Q. Did you have a fog-horn also?

A. When you are laying at an anchor the bell is all that is needed, but a horn when you are under way. [135]

Q. That night no attempt was made to use the

(Deposition of T. A. Grant.)

horn? A. No, sir, only the bell.

Q. Only the bell? A. Yes, sir.

Q. You were not there, you do not know?

A. I know the orders were carried out. The orders were to use your bell and to keep a good lookout.

Q. Do you give those orders all the time?

A. I *making* a standing order.

Q. You may have made that order two months before?

A. Every night when I go I say: "You take care of the orders, going over the side. You know what to do; you keep your lights lit and your fog-horn or bell blowing." They had not been bothered with much fog.

Q. Do you mean you said that every night?

A. As a rule, I would, going over the side. They knew the standing orders were to keep a good lookout and the bell going in the fog, especially the riding lights. "You keep a good lookout in case they go out."

Q. How is that bell worked?

A. By hand ringing.

Q. By hitting against the side? A. Yes, sir.

Mr. CAMPBELL.—Do you move the bell or clapper? A. You move the clapper.

Mr. HENGSTLER.—Q. Whereabouts on board of the ship is that bell located?

A. On the forward end.

Q. Is it stationary?

A. Stationary. There is one forward and one aft, though the aft one is not used as a fog-horn. It is

(Deposition of T. A. Grant.)

only used for regulating watches. The fog-bell is forward and is used for fog-bell—fire-bell, or whatever bell you would use it for.

Q. With respect to the forecastle, whereabouts is that?

A. The forecastle in the “Fullerton” is aft. She is an oil [136] tanker, and not like the usual ship.

Q. How far forward is that bell located?

A. Between the foremast and the knight-heads. Whether it is on the foremast or not, I do not know. I forget now just where it is.

Q. It is on the highest part of the vessel, or is there any deck above it?

A. There is no deck above it. It is on the highest part; that is, if it was on the aft part of the forecastle-head that would be the upper deck.

Q. Then the bell itself would be on the upper deck?

A. Yes, sir.

Q. But you are not sure?

A. No, sir; some ships have it on the foremast. I forget just where it is, on the rail or foremast, but I think the rail on the forecastle-head.

Q. Has it been changed in its location since?

A. Not that I know of.

Q. Have you seen it recently? A. No, sir.

Q. You have not looked at it?

A. I only seen it laying in the dock at a distance.

Q. Where is the “Fullerton” now?

A. Somewheres between here and Port Harford, plying between Port Harford and San Francisco.

Q. You are not master of her any more, are you?

(Deposition of T. A. Grant.)

A. No, sir.

Q. How long since you left her, is it?

A. I left her December 18th, 1909.

Q. Are you master of a vessel now?

A. Not just at the present time.

Q. Have you been since you left the "Fullerton"?

A. I have been in charge of the "Lansing," the "Pectan," and the "Santa Rita." I left the "Santa Rita" three days ago and I am going back in her at the end of the month. [137]

Q. Are the "Lansing" and the "Pectan" sailing vessels? A. Steamships.

Q. All three are steamships? A. Yes, sir.

Q. What does the law prescribe with respect to the electric lights?

A. Well, we are not supposed to have electric lights on a sailing ship. In fact, generally, you do not have no electric lights on a sailing ship; you use an oil-lamp, but she is an oil-tanker and not allowed any naked lights. We have to use electric lights, which are much better than oil.

Q. You say the electric lights were in perfect condition according to the regulation of law?

A. Yes, sir.

Q. What does the law prescribe about riding lights on vessels?

MR. CAMPBELL.—We object to the question. The witness is here to testify to facts, but not required to testify to the law.

MR. HENGSTLER.—If he volunteers his impression of the law I would like to know what it is.

(Deposition of T. A. Grant.)

A. There are two riding lights on a ship, one on each end of her. She is over 200 feet long. The forward light has to be higher than the aft light.

Q. Does it make any difference how high they are, as long as the forward light—

A. We generally put the forward one about 15 or 20 feet above the main deck and the other light below. We just have a difference to distinguish one end of the ship to the other. When the ship is lying at anchor, if you have one higher than the other you can tell which way she is heading. The stern light is the lowest light.

Q. Do you know how far the sound of your bell on your vessel [138] carries, Captain? Have you ever made any experiments with it?

A. No, sir; we are not supposed to know how far she carries. We just know the bell is there and ring it.

Q. Whatever bell you have on you ring?

A. The bell we have there for that purpose is rung. We do not know how far the sound carries in the fog. You cannot rely on that. One time you hear it a long way, and sometime very short. Take all your whistles on the coast—I have been off and heard the whistle of Point Reyes 21 miles, and at other times you cannot hear it two miles. It is just according to the density of the fog and atmosphere.

Q. How long have you been the master of the “Fullerton”? A. Since April.

Q. That same year? A. Yes, sir.

Q. How many voyages had you made?

(Deposition of T. A. Grant.)

A. Two voyages to Honolulu and quite a number on the coast up to Portland. I forget how many. We considered a voyage from loading to loading. Our run between here and Port Harford is only 200 miles. We made a voyage in four days.

Q. You made two voyages in here to Honolulu?

A. Two to Honolulu and one to San Pedro and Portland. A number of them between San Francisco, Oleum and Port Harford. I do not know just how many. I made quite a number.

Q. Before the day of the collision you did not pay any particular attention to the "Transit," did you, Captain?

A. Well, the engineer remarked to me that she used to come too close, and I have had to haul my boat up lying astern to get clear of her. On certain stages of the tide she came too close to the ship. With the ebb tide certainly she could not drive on there against the tide. The captain knows what [139] his ship can do. When he uses his own judgment he could come right up so that he could touch the ship, practically; as long as the current carries it away from the ship it would be no danger.

Q. If he knew his vessel he could come within two feet?

A. Two feet would be quite close if the ship's steering was bad.

Q. You noticed, also, she used to come too close?

A. Yes, sir.

Q. Was that the regular thing, that she was passing you at a very short distance?

(Deposition of T. A. Grant.)

A. As I say, at certain stages of the tide you could come close and at flood tide keep away.

Q. Is it not a fact that the flood tide would make you go away?

A. Yes, sir; naturally, the captain would give you a wider berth when the current would set you towards a danger than he would when it was setting you off a danger.

Mr. FOULDS.—Q. When the tide was ebbing she would come closer sometimes?

A. Closer on an ebb than a flood. The ship would be farther away from the fairway and naturally keep away to counteract the tide. In making a landing you have noticed how the ferry-boats run to Goat Island at flood tide and keep up the other way to counteract the current.

Q. How long was the engineer's night watch when the ship was at anchor as she was that night of the collision?

A. I could not tell you. They had to arrange between the two of them; one would relieve the other. Still, the engineer was on generally on the heaviest part of the night. The other watchman may come on at 8, or he may come on at 4 or 5 in the morning. They had it divided between them. [140]

Q. Was it foggy when you left the boat?

A. No, sir, it was clear.

Q. Any indications of fog that evening?

A. No indication of fog.

Q. You say it was the engineer's duty to attend to the electric lights?

(Deposition of T. A. Grant.)

A. It was his duty to start the engines; they would practically run themselves.

Q. Was the engine run entirely by gasoline?

A. Our engines are different from any others; *They* are only two other engines on the coast like that.

Q. Have you ever known them to stop and require attention to start them again?

A. Not that I know of; we never had any trouble with our lights.

Q. If anything had happened with the engine had you any storage battery to light the lights until the engine was repaired? A. We had two dynamos.

Q. You only had one engine, and if anything happened to the engine the lights would go out?

A. If anything happened to the engine—

Q. The lights would go out until it was repaired?

A. They would not go out because we had oil lights in case of an accident, but we never used them unless it was absolutely necessary.

Q. If the engine had run irregularly the engineer undoubtedly would have run down to the engine and let the fog-bell go for a while?

A. That would have been his duty. The engine and the fog-bell is right together. It is not like you to go away. The bell is right there. It has a cord and he could stand at his engine-room door if he wanted to and ring the bell. He had a cord leading down there in case he was not [141] on the fore-castle-head to ring it.

Mr. HENGSTLER.—Q. He could pull the cord from the engine-room? A. Yes, sir.

(Deposition of T. A. Grant.)

Mr. FOULDS.—Q. Is the engine far from the door? A. Just a little ways.

Mr. HENGSTLER.—Q. You are sure the engineer would not have to step out of the door to work the bell?

A. Certainly he would be on the deck to work the bell.

Q. Could he do it in the engine-room?

A. No, sir.

Mr. FOULDS.—Q. There is a small ladder up to the deck?

A. The engine on the “Fullerton” is on her main deck under the forecastle-head.

Mr. HENGSTLER.—Q. It is a fact, is it not, Captain, that he could not work the engine and bell at the same time?

Mr. FOULDS.—Q. (Intg.) If anything had gone wrong?

A. I presume if he had to work the engine he would call the other watchman.

Mr. HENGSTLER.—Q. You presume?

A. Certainly, if he had to leave the deck he would call the other man.

Mr. FOULDS.—Q. He could not do both at the same time.

A. No, sir. A watchman would not go off the deck unless he had a man to relieve him in a position like that, because that would be out of all rules of navigation. A man is never supposed to leave his position unless he is relieved. You see, on a ship like that lying in the bay we only keep the engineer there for the lights.

(Deposition of T. A. Grant.)

Q. You recognize, of course, there was a possibility of the lights going out, and that is the reason you had him there?

A. He was there to look out for his engine and to keep it in repair. As a rule, on a sailing vessel like that they only [142] have one watchman, one there day and night, and he is supposed to sleep in the daytime. We had two watchmen. I do not know how the watches were regulated. As I came around the engineer was there on watch that night.

Redirect Examination.

Mr. CAMPBELL.—Q. How large a vessel is the “Pectan”?

A. The “Pectan” is five thousand and some nine hundred odd tons.

Q. What size is the “Santa Rita”?

A. She is 3682.

Q. And the “Lansing”?

A. Approximately 3,600. 3,500, I should say. The “Pectan” is the second largest oil-tanker in the world.

Q. When you were lying at anchor with an ebb tide would the stern of the “Fullerton” reach into the forbidden anchorage? A. No, sir.

Q. You are going east with the body of your brother now? A. Yes, sir.

Mr. FOULDS.—Q. When do you expect to be back, Captain? A. In about a month.

Q. Do you know the size of the bell on the “Fullerton”? How wide would you say was the mouth of the bell?

(Deposition of T. A. Grant.)

A. I do not know. I forget the size. I could not say. [143]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, a United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing deposition is that the testimony of the witness T. A. Grant is material and necessary in the cause in the caption of the said deposition named, and that he is bound on a voyage to sea and will be more than one hundred miles from the place of trial at the time of trial.

I further certify that on Tuesday, January 7th, 1913, I was attended by Ira A. Campbell, Esq., proctor for the claimant and cross-libelant, and L. C. Hengstler, Esq., and E. J. Foulds, Esq., proctors for the libelant and cross-respondent, and by the witness, and that the witness was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said deposition was, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Herbert Bennett, and afterwards reduced to typewriting; that the reading over and signing of said deposition of the witness was by the aforesaid stipulation expressly waived.

Introduced in connection therewith and referred to and specified therein is "Claimant's Cross-libelant's Exhibit 1."

I further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of California, the Court for which [144] the same was taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 17th day of January, 1913.

[Seal]

FRANCIS KRULL,

U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed Jan. 16, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [145]

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,070.

SOUTHERN PACIFIC CO.,

Libelant,

vs.

The Barkentine "FULLERTON," etc.,

Defendant.

Memorandum Decision.

DIETRICH, District Judge.

While there are some features of the testimony which if detached tend to show a want of care in the navigation of the "Transit" immediately prior to the collision, considering the entire record I am inclined to the view that such a conclusion is not warranted. Upon the other hand, although the greater number of witnesses gave negative testimony in support of the libelant's contention that the "Fullerton's" bell was not properly sounded, it is not sufficient to overcome the positive statements of the three men who were upon the "Fullerton," to the effect that the bell was being rung in the manner required by the rules. It should be held, I think, that the collision was due to an inevitable accident, and that therefore it falls within the rule of "The Morning Light" (2 Wall. 550, 56). If not an inevitable accident, it is a case of inscrutable fault, and [146] falls within the rule of "The Worthington and Davis" (19 Fed. 836); in either alternative the result is the same. Both the libel and the cross-libel will therefore be dismissed.

[Endorsed]: Jan. 24, 1913. W. B. Maling, Clerk.
By Francis Krull, D. C. [147]

*In the District Court of the United States for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,070.

MISSION TRANSPORTATION AND REFINING
COMPANY, a Corporation,

Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Cross-respondent and Libelant.

Decree Dismissing Cross-Libelant's Libel.

This cause having come on regularly for trial the 17th day of January, 1913, before the Honorable F. S. Dietrich, Judge, and having been regularly continued from said day to the 20th day of January, 1913, and, after argument of counsel, having been submitted, and the Court on the 24th day of January, 1913, having filed herein its memorandum decision, directing the dismissal of the cross-libel herein;

Now, therefore, the Court, being fully advised in the premises, it is hereby ordered, adjudged and decreed that the cross-libelant herein take nothing, and that its cross-libel be dismissed without costs.

Dated February 1, 1913.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Feb. 1, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [148]

*In the District Court of the United States for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,070.

SOUTHERN PACIFIC COMPANY,

Libelant,

vs.

The Barkentine "FULLERTON," etc.,

Respondent,

MISSION TRANSPORTATION AND REFINING
COMPANY, a Corporation,

Claimant.

Decree Dismissing Libelant's Libel.

This cause having come on regularly for trial on the 17th day of January, 1913, before the Honorable F. S. Dietrich, Judge, and having been regularly continued from said day to the 20th day of January, 1913, and, after argument of counsel, having been submitted, and the Court, on the 24th day of January, 1913, having filed herein its memorandum decision, directing the dismissal of the libel herein;

Now, therefore, the Court, being fully advised in the premises it is hereby ordered, adjudged and decreed that the libelant herein take nothing, and that its libel be dismissed without costs.

Dated February 5th, 1913.

FRANK S. DIETRICH.

[Endorsed]: Filed Feb. 5, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [149]

*In the District Court of the United States for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,070.

MISSION TRANSPORTATION AND REFINING
COMPANY, a Corporation,
Cross-libelant.

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Cross-respondent.

SOUTHERN PACIFIC COMPANY, a Corporation,
Libelant,

vs.

The Barkentine "FULLERTON," etc.,
Respondent.

MISSION TRANSPORTATION AND REFINING
COMPANY, a Corporation,
Claimant.

**Notice of Mission Transportation & Refining Co. of
Appeal from Decree Dismissing Cross-libel.**

To the Clerk of the Above-entitled Court, and to the
Libelant and Cross-respondent herein, and to
Messrs. Andros & Hengstler and J. E. Foulds,
Its Proctors.

You and each of you will hereby please take notice
that the Mission Transportation and Refining Com-
pany, a [150] corporation, claimant and cross-li-
belant, herein, hereby appeals from the final decree
made and entered herein on the first day of Febru-
ary, 1913, dismissing the cross-libel on file herein, to

the next United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit at the City and County of San Francisco.

Dated February 3, 1913.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Cross-libelant.

Service of the within Notice of Appeal and receipt of a copy is hereby admitted this 10th day of February, 1913.

ANDROS & HENGSTLER,
Proctors for X-Respondent.

[Endorsed]: Filed Feb. 10, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [151]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

MISSION TRANSPORTATION AND REFINING
COMPANY, a Corporation,
Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Cross-respondent.

**Assignment of Errors of Mission Transportation
and Refining Co.**

The cross-libelant, Mission Transportation and Refining Company, a corporation, hereby assigns errors in the proceedings of the District Court, as follows:

1. That the District Court erred in holding that cross-libelant was not entitled to recover from cross-respondent the damages received by its barkentine "Fullerton," as alleged and prayed for in its cross-libel.

2. That the District Court erred in entering its decree, ordering, adjudging and decreeing that cross-libelant take nothing, and in dismissing its cross-libel. [152]

3. That the District Court erred in holding that the collision between cross-libelant's barkentine "Fullerton" and cross-respondent's steamer "Transit" was due to an inevitable accident.

4. That the District Court erred in holding that the collision between cross-libelant's barkentine "Fullerton" and cross-respondent's steamer "Transit" was due to an inscrutable fault.

5. That the District Court erred in not holding that cross-respondent had not overcome the presumption of fault resting upon its steamer "Transit," as the moving vessel, for the damages inflicted upon cross-libelant's barkentine "Fullerton," the anchored vessel.

6. That the District Court erred in not holding that cross-respondent's steamer "Transit" was in fault, as a moving vessel, for colliding with cross-libelant's barkentine "Fullerton," as an anchored vessel.

7. That the District Court erred in not holding that cross-respondent's steamer "Transit" was in fault in proceeding at an excessive rate of speed in the fog.

8. That the District Court erred in not holding that cross-respondent's steamer "Transit" was in fault for not obeying the second paragraph of Rule 16 of the Inland Rules of Navigation, in that said steamer did not stop its engine when first hearing, forward of her beam, the fog signal of cross-libelant's [153] barkentine "Fullerton," and in not then navigating with caution until the danger of collision was over.

9. The District Court erred in not holding that cross-respondent's steamer "Transit" was in fault for not stopping and backing when said steamer first came into view of cross-libelant's barkentine "Fullerton."

10. That the District Court erred in not holding cross-respondent's steamer "Transit" in fault for proceeding at full speed after said steamer came into view of cross-libelant's barkentine "Fullerton."

11. That the District Court erred in not holding that cross-respondent's steamer "Transit" was unskillfully and negligently and carelessly navigated, in that she proceeded through a dense fog without having a navigating officer outside of the pilot-house on the upper deck or bridge of said steamer.

12. That the District Court erred in not holding that cross-respondent's steamer "Transit" was unskillfully and carelessly and negligently navigated, in that her master instead of performing the duties, and maintaining the watch, properly required of the master of a steamer navigating in a fog, was acting as quartermaster and had his attention fixed

upon the compass in the pilot-house.

Dated: San Francisco, March 8, 1913.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Cross-libelant. [154]

[Endorsed]: Filed Mar. 10, 1913. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [155]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,070.

MISSION TRANSPORTATION AND REFINING
COMPANY, a Corporation,

Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Cross-respondent.

**Undertaking on Appeal [of Mission Transportation
and Refining Co.].**

WHEREAS, the cross-libelant in the above-entitled action has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a final decree rendered and entered against it on the first day of February, 1913, in said action, dismissing the cross-libel of Mission Transportation and Refining Company, a Corporation,—

NOW, THEREFORE, in consideration of the premises and of such appeal, the National Surety Company, a corporation, duly incorporated under the laws of the State of New York, for the purpose

of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the State of California, respecting such corporations, does hereby undertake and promise on the part of the appellant that the said appellant will pay all costs which may be awarded against it on this appeal [156] or on a dismissal thereof not exceeding the sum of Two Hundred and Fifty (250) Dollars, to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said National Surety Company, a corporation, has caused this obligation to be signed by its duly authorized attorney in fact, and its corporate seal to be hereunto affixed in the City and County of San Francisco, Northern District of California, this 20th day of February, 1913.

NATIONAL SURETY COMPANY,

By FRANK L. GILBERT, [Seal]

Attorney in Fact.

We hereby accept the above bond.

LOUIS T. HENGSTLER,

Proctor for Cross-respondent.

The above bond is hereby approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Feb. 20, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [157]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,070.

SOUTHERN PACIFIC COMPANY,

Libelant,

vs.

Barkentine "FULLERTON,"

Respondent.

MISSION TRANSPORTATION AND REFINING
COMPANY, a Corporation,

Claimant and Cross-libelant.

Stipulation (and Order Re Exhibits).

It is hereby stipulated and agreed by and between the parties hereto that all the exhibits introduced in the above-entitled cause, and in the depositions taken before the Commissioner, be sent up to the United States Circuit Court of Appeals for the Ninth Circuit as original exhibits with the apostles on appeal.

Dated March 12, 1913.

E. J. FOULDS,

LOUIS T. HENGSTLER,

Proctors for Libelant.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Claimant and Cross-libelant.

It is so ordered.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Apr. 1, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [158]

Certificate of Clerk U. S. District Court to Apostles.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed one hundred and fifty-eight pages, numbered from 1 to 158, inclusive, with the accompanying exhibits, 8 in number (transmitted under separate cover as per stipulation of parties and order of said Court, copy of which is contained herein), contain a full, true and correct Transcript of the Records, as the same now appear on file and of record in the said District Court, in the cause entitled Southern Pacific Company, a corporation, vs. Barkentine "Fullerton," her tackle, apparel and furniture, etc., and numbered 15,070, and which said Transcript of Appeal is made up pursuant to, and in accordance with "Praecipe" (copy of which is embodied in said Transcript), and the instructions of Messrs. Ira A. Campbell, McCutchen, Olney and Willard, proctors for appellants herein.

I further certify that the costs of preparing and certifying to the foregoing Transcript of Appeal is the sum of Eighty-eight Dollars and Sixty cents (\$88.60), and that the same has been paid to me by proctors for appellants herein.

In witness whereof, I have hereunto set my hand

and the seal of said District Court this 1st day of April, A. D. 1913.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [159]

[Endorsed]: No. 2262. United States Circuit Court of Appeals for the Ninth Circuit. Mission Transportation and Refining Company, a Corporation, Claimant of the Barkentine "Fullerton," etc., Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed April 1, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the District Court of the United States, in and
for the Northern District of California.*

No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corporation,
Libellant,

vs.

Barkentine "FULLERTON," Her Tackle, Apparel
and Furniture,

Respondent.

**Order Extending Time [to March 15, 1913, in Which
to File Apostles on Appeal].**

Good cause appearing therefor, it is hereby ordered that the Clerk of the above-entitled Court have to and including the 15th day of March, 1913, in which to prepare the Apostles on Appeal herein.

WM. C. VAN FLEET,

Judge.

Dated San Francisco, Cal., March 12th, 1913.

[Endorsed]: No. 15,070. U. S. District Court, Northern District of California. Southern Pac. Co. vs. Mission Transportation Co. Filed Mar. 12, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

No. 2262. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Mar. 15, 1913, to File Record Thereof and to Docket Case. Filed Mar. 12, 1913. F. D. Monckton, Clerk.

*In the Circuit Court of Appeals of the United States
for the Ninth Circuit.*

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee and Cross-appellant,

vs.

Barkentine "FULLERTON," Her Tackle, Apparel
and Furniture,

Appellant and Cross-appellee.

**Order Extending Time [to April 1, 1913] to File
Transcript of Appeal.**

Upon request of proctors for the respective par-

ties herein, that further time is desired in which to perfect the Transcript of Appeal taken in the above-entitled cause,—

It is hereby ordered that said parties have further time, to wit, to and including April 1st, 1913, in which to file in the Circuit Court of Appeals of the United States for the Ninth Circuit the said Transcript of Appeal.

Dated March 15th, 1913.

WM. C. VAN FLEET,

Judge.

[Endorsed]: No. 2262. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Apr. 1, 1913, to File Record Thereof and to Docket Case. Filed Mar. 17, 1913. F. D. Monckton, Clerk.

No. 2262. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to and Including Apr. 1, 1913, to File Record Thereof and to Docket Case. Refiled Apr. 1, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2262.

MISSION TRANSPORTATION AND REFINING
COMPANY, a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

**Notice of Mission Transportation and Refining Co.
of Filing of Apostles on Appeal.**

To the Southern Pacific Company, Appellee Herein,
and to J. E. Foulds, Esq., and L. T. Hengstler,
Esq., Proctors for Appellee:

You, and each of you, will please hereby take notice that the apostles on appeal in the above-entitled cause were on the 1st day of April, 1913, filed with the clerk of the above-entitled court.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.

Dated April —, 1913.

[Endorsed]: No. 2262. U. S. Circuit Court of Appeals for the Ninth Circuit. Mission Transportation and Refining Company, a Corporation, Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Notice of Filing of Apostles on Appeal. Filed Apr. 8, 1913. F. D. Monckton, Clerk.

Receipt of a copy of the *with* notice of filing of apostles on appeal is hereby admitted this 8th day of April, 1913.

J. E. FOULDS,

LOUIS T. HENGSTLER,

Proctors for Appellees.

Certificate as to Exhibits.

I, W. B. Maling, Clerk of the District Court of the United States, Northern District of California, hereby certify that the hereunto attached documents, eight (8) in number, known as and marked:

Libelant's Exhibit 1 (pencil diagram);

Claimant's Exhibit 1 (Chart—San Francisco entrance);

Claimant's Exhibit 2 (Map showing forbidden anchorage);

Claimant's Exhibit 3 (pencil diagram);

Claimant's Exhibit 4 (pencil diagram);

Claimant's Exhibit 5 (pencil diagram);

Claimant's Exhibit 6 (pencil diagram);

Claimant's Exhibit 7 (pencil diagram);

are original exhibits introduced and filed at the hearing of the cause entitled Southern Pacific Company, a corporation, Libelant, vs. Barkentine "Fullerton," Her Tackle, Apparel and Furniture, etc., Defendant, No. 15,070, as the same now appear on file and of record in this office.

WITNESS my hand and official seal of said District Court at San Francisco, in said District, this 1st day of April, A. D. 1913.

[Seal]

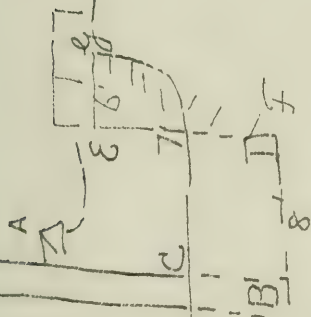
W. B. MALING,

Clerk.

By Lyle S. Morris,

Deputy Clerk.

Libr Ex 1.
 15070 SPC vs Fullerton
 Filed Jan 29/13
 Francis Hull



$2E = 7$

CASE No. 2262
 U. S. CIRCUIT COURT OF APPEALS
 FOR THE NINTH CIRCUIT
 LIBELANTS EXHIBIT 1.
 Received APR. 1. 1913.
 F.D. MONCKTON, Clerk.

[illegible]

Copyright 1914
U.S. GEOLOGICAL SURVEY
San Francisco, California
Published May 1, 1914
1:50,000



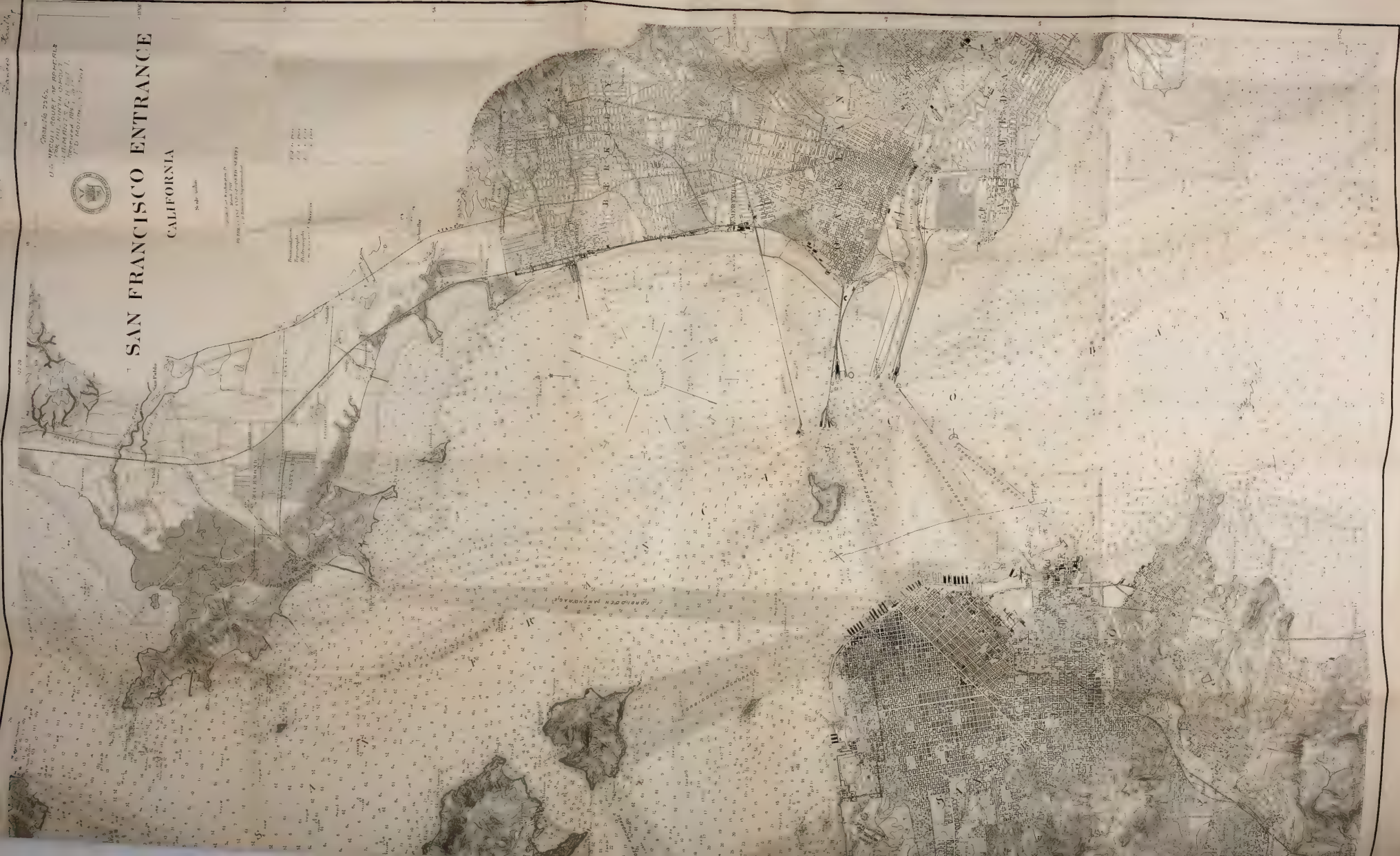
SAN FRANCISCO ENTRANCE

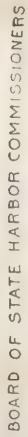
CALIFORNIA

Scale 1:50,000

Published by the U.S. Geological Survey
in 1914, and revised in 1915

Topography
Hydrography
Geology



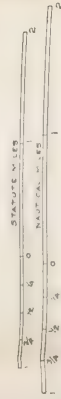


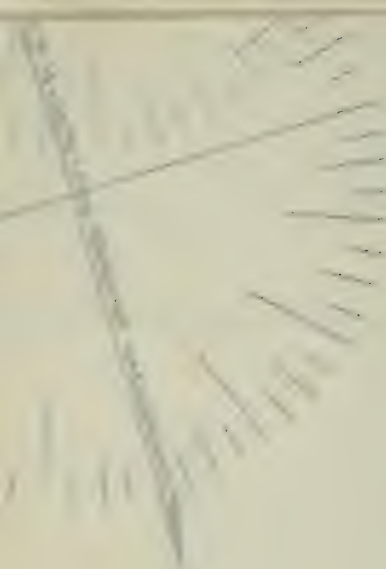
MAP SHOWING

FORBIDDEN ANCHORAGE

BAY OF SAN FRANCISCO

MAR 1910





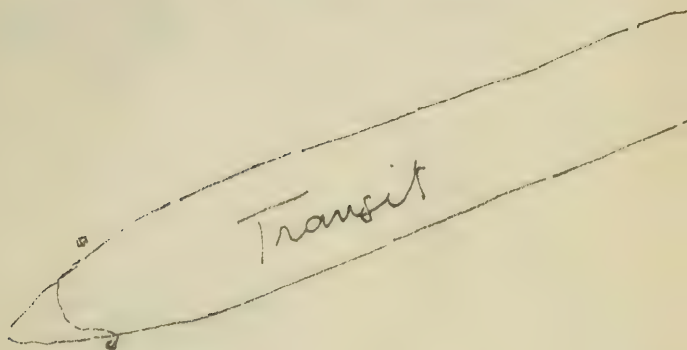
BOOK 2 8

THE UNIVERSITY OF CHICAGO
LIBRARY
540 EAST 57TH STREET
CHICAGO, ILL. 60637
TEL. 773-936-5000

#15070 S. P. Co. vs The "Fullerton" ac
Clinto Ex #3
Filed Jan 17/10
Hull, D.C.

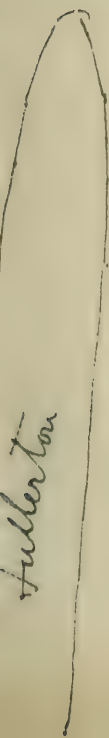
188

N



W

E



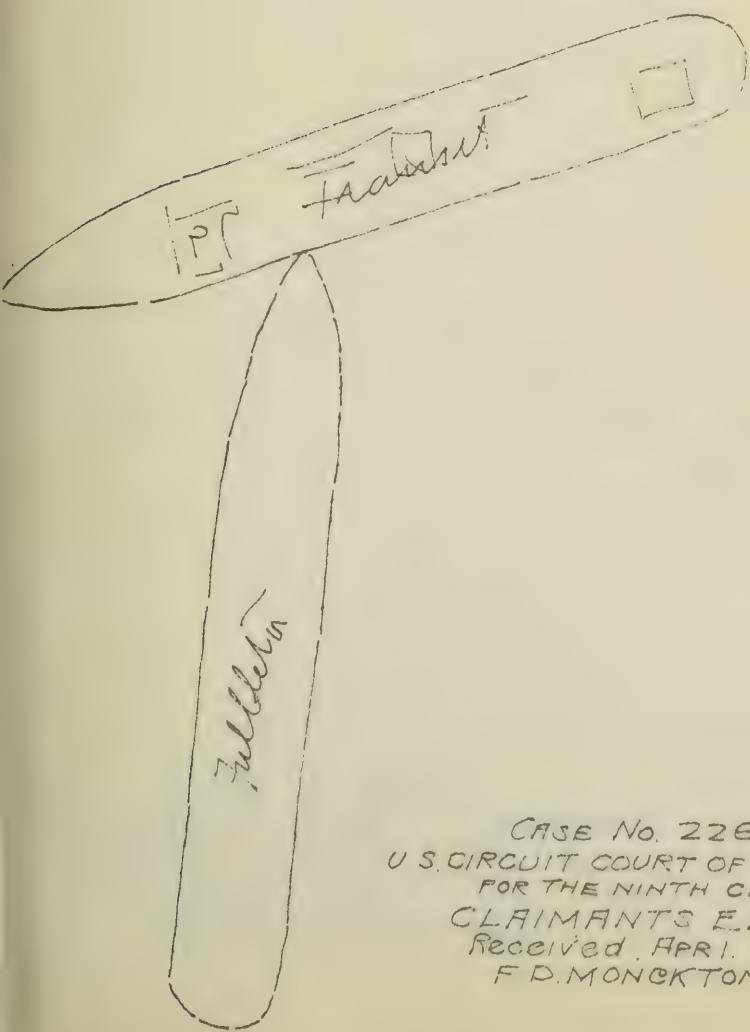
Fullerton

CASE No. 2262.
U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
CLAIMANTS EXHIBIT 3.
Received APR. 1. 1913.
F. D. MONCKTON, Clerk.

S

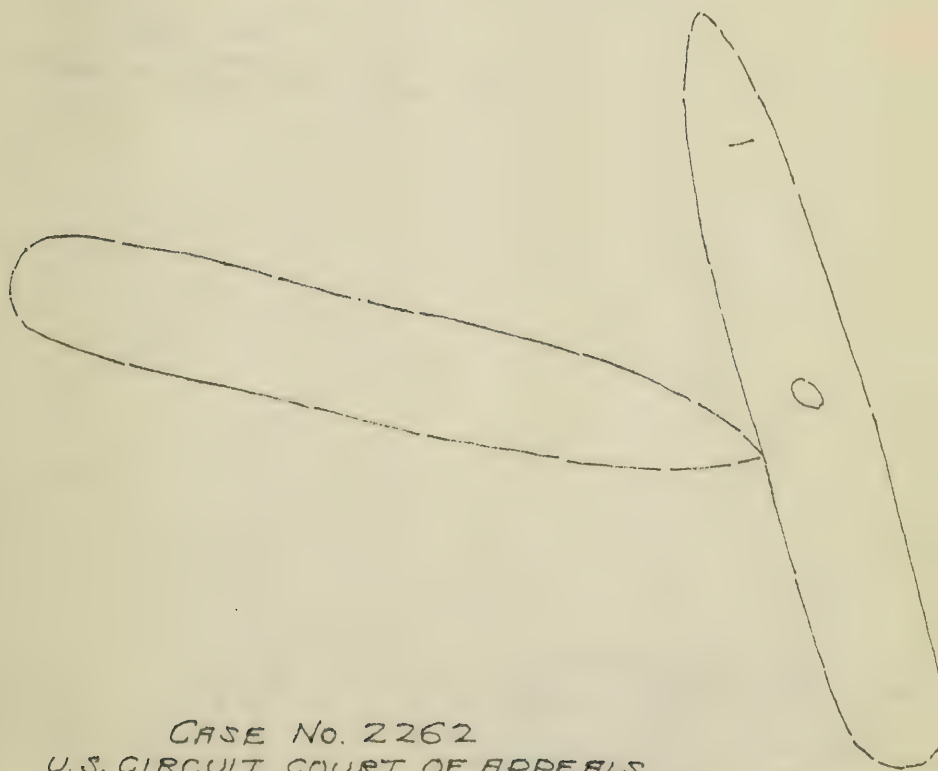


Clint E 4
#15070 P. vs Fullerton
Filed Jan 17/13
Thrall, L. J.



CASE No. 2262.
U.S. CIRCUIT COURT OF APPEAL
FOR THE NINTH CIRCUIT
CLAIMANTS EXHIBIT -
Received, APRIL 1913
F.D. MONCKTON, Clerk.

Cluato Ex # 5
 #15070 L.P. Co. vs Fullerton
 Filed Jan 17/13
 Grull H. F.



CASE No. 2262
 U.S. CIRCUIT COURT OF APPEALS
 FOR THE NINTH CIRCUIT
 CLAIMANTS EXHIBIT 5
 Received APR. 1. 1913.
 F.D. MONCKTON, Clerk.

Fullerton

#15070 Sp Co.

17

Fullerton

Clinto Ex # 6.
 File Jan 17/13
 Francis Hull
 D.C.

Hawth

CASE No. 2262.
 U. S. CIRCUIT COURT OF APPEALS
 FOR THE NINTH CIRCUIT
 CLAIMANTS EXHIBIT 6
 Received APR. 1. 1913
 F.D. MONCKTON, Clerk.

#15070 Sp Co vs Fullerton
 Auto Ex # 7
 Filed Jan 12/13
 Francis Knell
 D.C.

Fullerton

CASE No. 2262

U.S. CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAIMANTS EXHIBIT 7.

Received APR. 1. 1913

F.D. MONCKTON, Clerk.

Francis

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,
Cross-Appellant,

vs.

MISSION TRANSPORTATION AND REFINING COM-
PANY, a Corporation, Claimant of the Barkentine
"FULLERTON", etc.,
Cross-Appellee.

Apostles on Cross-Appeal.

Upon Appeal from the United States District Court for the
Northern District of California, First Division.

UNITED STATES OF AMERICA.

*District Court of the United States, Northern Dis-
trict of California, First Division.*

Clerk's Office.

No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Libelant,

vs.

The Barkentine "FULLERTON," etc.,

Respondent.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,

Claimant.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,

Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Cross-respondent.

Praeipie [for Apostles on Cross-appeal].

To the Clerk of said Court:

Sir: You will please take notice that the apostles on appeal requested to be prepared in the praeipie of the proctors for cross-libelant in the above-entitled cause will constitute in part the apostles on appeal of libelant, Southern Pacific Company, a corporation, and you are directed to prepare and

certify, to be filed in the Circuit Court of Appeals, immediately as a part of said apostles on appeal the following papers:

1. Notice of cross-appeal of Southern Pacific Company from decree dismissing libel.
2. Assignment of errors of libelant.
3. Stipulation that record on appeal may constitute record on cross-appeal.

These papers are to be prepared by you and filed in the Circuit Court of Appeals pursuant to the stipulation hereinabove mentioned. [1*]

Dated April 4th, 1913.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
J. E. FOULDS,

Proctors for Southern Pacific Company.

[Endorsed]: Filed Apr. 4, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corporation,
Libelant,

vs.

The Barkentine "FULLERTON," etc.,

Respondent.

*Page-number appearing at foot of page of original certified Record.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,
Claimant.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,
Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,
Cross-respondent.

**Notice of Cross-appeal of Southern Pacific Company
from Decree Dismissing Libel.**

To the Clerk of the Above-entitled Court, and to
Mission Transportation and Refining Company,
a Corporation, Claimant, Cross-libelant and Ap-
pellant Herein, and to Messrs. Ira A. Campbell
and McCutchen, Olney & Willard, Its Proctors:

You, and each of you, will hereby please take notice
that the Southern Pacific Company, a corporation,
libelant and cross-respondent herein, hereby appeals
from the final decree made and entered herein on the
5th day of February, 1913, dismissing the libel on
file herein, to the next United States Circuit Court
[3] of Appeals, for the Ninth Circuit, to be holden
in and for said Circuit at the City and County of
San Francisco.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
J. E. FOULDS,

Proctors for Libelant and Cross-respondent.

Due service and receipt of a copy of the within Notice of Cross-appeal is hereby admitted this 27th day of March, 1913.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant and Cross-libelant.

[Endorsed]: Filed Apr. 4, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [4]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Libelant,

vs.

The Barkentine "FULLERTON," etc.,

Respondent.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,

Claimant,

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,

Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Cross-respondent.

Assignment of Errors.

The libelant, Southern Pacific Company, a corporation, hereby assigns errors in the proceedings of the District Court, as follows:

1. That the District Court erred in holding that libelant, Southern Pacific Company, was not entitled to recover the damages received by its steamer "Transit," as alleged and prayed for in its libel.

2. That the District Court erred in entering its decree, ordering, adjudging and decreeing that libelant, Southern Pacific Company, take nothing, and in dismissing its libel.

3. That the District Court erred in holding that the collision between the barkentine "Fullerton" and libelant's steamer [5] "Transit" was due to an inevitable accident.

4. That the District Court erred in holding that the collision between the barkentine "Fullerton" and libelant's steamer "Transit" was due to an inscrutable fault.

5. That the District Court erred in considering and holding that the testimony in support of libelant's contention that the "Fullerton's" bell was not properly sounded, was negative testimony.

6. That the District Court erred in holding that the testimony in support of libelant's contention that the "Fullerton's" bell was not properly sounded was not sufficient to overcome the statements to the effect that the bell was being rung in the manner required by the Rules.

7. That the District Court erred in not holding

that the testimony in support of libelant's contention that the "Fullerton's" bell was not properly sounded was and is sufficient to overcome the statements of the men on the "Fullerton" to the effect that the bell was being rung in the manner required by the Rules.

8. That the District Court erred in not holding that the barkentine "Fullerton" was solely at fault in colliding with the steamer "Transit," in that the bell on the "Fullerton" was not properly sounded while the "Fullerton" was at anchor in a dense fog.

9. That the District Court erred in not holding that the "Fullerton" was at fault in colliding with the "Transit," in that the "Fullerton" was knowingly lying at an improper anchorage in a dense fog, to wit, in dangerous proximity to the known fairway of the "Transit," required for her passage from the city of Oakland to the city and county of San Francisco.

10. That the District Court erred in not holding that the collision with the "Fullerton" occurred without fault on the part of the "Transit."

Dated San Francisco, Cal., March 27, 1913.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
J. E. FOULDS,

Proctors for Libelant Southern Pacific Company.

[6]

[Endorsed]: Filed Apr. 4, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [7]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Libelant,

vs.

The Barkentine "FULLERTON," etc.,

Respondent.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,

Claimant,

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,

Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Cross-respondent.

Undertaking on Cross-appeal.

WHEREAS, the Libelant, Southern Pacific Com-
pany, a corporation, in the above-entitled action, has
appealed to the United States Circuit Court of Ap-
peals for the Ninth Circuit, from a final decree ren-
dered and entered against it on the 5th day of Feb-
ruary, 1913, in said action, dismissing the libel of
Southern Pacific Company, a corporation.

NOW, THEREFORE, in consideration of the

premises, and of such appeal, National Surety Company, duly incorporated under the laws of the State of New York for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements [8] of the laws of the State of California respecting such corporations, does hereby undertake and promise on the part of the appellant, that the said appellant will pay all costs which may be awarded against it on this appeal, or on a dismissal thereof, not exceeding the sum of Two Hundred and Fifty Dollars (\$250.00), to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said National Surety Company has caused this obligation to be signed by its officers thereunto duly authorized and its corporate seal to be hereunto affixed in the City and County of San Francisco, Northern District of California, this fourth day of April, 1913.

NATIONAL SURETY COMPANY.

[Seal]

By FRANK. L. GILBERT,
Attorney in Fact.

The above bond is hereby approved.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Apr. 4, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [9]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Libelant,

vs.

The Barkentine "FULLERTON," etc.,

Respondent.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,

Claimant.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,

Cross-libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Cross-respondent.

**Stipulation That Record on Appeal may Constitute
Record on Cross-appeal.**

IT IS HEREBY STIPULATED AND AGREED
by and between the parties hereto that the apostles
on appeal, now being prepared at the request of the
proctors for claimant and cross-libelant herein, may
constitute and be considered as the apostles on appeal
of libelant and cross-respondent, Southern Pacific
Company, a corporation, on its cross-appeal herein,

with the exception of the notice of appeal of said libellant and cross-respondent, Southern Pacific Company, and its assignments of error, which shall be added thereunto.

Dated March 27, 1913.

J. E. FOULDS,
ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,

Proctors for Libellant and Cross-respondent.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant and Cross-libellant. [10]

[Endorsed]: Filed Apr. 4, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [11]

**Certificate of Clerk [U. S. District Court to Apostles
on Cross-appeal].**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed 11 pages, numbered from 1 to 11, inclusive, contain full, true and correct copies of Praeceptum for Transcript, Notice of Cross-appeal of Southern Pacific Company, Assignment of Errors, Bond on Cross-appeal, and Stipulation as to Record on Appeal, as the same now appear on file and of record in this office in the case of Southern Pacific Company, a corporation, libellant, vs. barkentine "Fullerton," her tackle, apparel and furniture, respondent, No. 15,070.

Said copies are herewith transmitted to the Circuit Court of Appeals of the United States for the

Ninth Circuit, in accordance with the Praeceptum for Transcript embodied herein, and instructions of Messrs. Andros and Hengstler, proctors for the Southern Pacific Company, etc., cross-appellant, herein.

I further certify that the costs of said transcript amount to the sum of \$4.80, and that the same has been paid to me by the proctors for cross-appellants herein.

In witness whereof, I have hereunto set my hand and official seal of said District Court this 12th day of April, 1913.

[Seal]

W. B. MALING,

Clerk.

By Lyle Morris,

Deputy Clerk. [12]

[Endorsed]: No. 2262. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Cross-appellant, vs. Mission Transportation and Refining Company, a Corporation, Claimant of the Barkentine "Fullerton," etc., Cross-appellee. Apostles on Cross-appeal. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed April 14, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2262.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Cross-appellant and Appellee,
vs.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation,
Appellant and Cross-appellee.

Notice of Filing of Apostles on Cross-Appeal.

To the Mission Transportation and Refining Com-
pany, Appellant Herein, and to McCutchen,
Olney & Willard and Ira A. Campbell, Esq.,
Proctors for Appellant:

You, and each of you, will please hereby take no-
tice that the apostles on cross-appeal in the above-
entitled cause were on the 14th day of April, 1913,
filed with the clerk of the above-entitled court.

Dated April 15th, 1913.

J. E. FOULDS,
LOUIS T. HENGSTLER,
ANDROS & HENGSTLER,
Proctors for Cross-Appellant.

Due service and receipt of a copy of the within no-
tice of filing of apostles on cross-appeal is hereby ad-
mitted this 15th day of April, 1913.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant and Cross-Appellee.

[Endorsed]: No. 2262. In the United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Cross-appellant and Appellee, vs. Mission Transportation and Refining Co., a Corporation, Appellant and Cross-appellee. Notice of Filing of Apostles on Cross-appeal. Filed Apr. 16, 1913. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MISSION TRANSPORTATION AND REFINING COM-
PANY, a Corporation, Claimant of the Barkentine
"FULLERTON," etc.,

Appellant and Cross-Appellee,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee and Cross-Appellant.

Supplemental Apostles on Appeal.
Additional Testimony.

Upon Appeal and Cross-Appeal from the United States
District Court for the Northern District of California,
First Division.

FILED

JUL 1 - 1913

United States
Circuit Court of Appeals
For the Ninth Circuit.

MISSION TRANSPORTATION AND REFINING COM-
PANY, a Corporation, Claimant of the Barkentine
“FULLERTON,” etc.,
Appellant and Cross-Appellee,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee and Cross-Appellant.

Supplemental Apostles on Appeal.
Additional Testimony.

Upon Appeal and Cross-Appeal from the United States
District Court for the Northern District of California,
First Division.

INDEX OF PRINTED SUPPLEMENTAL APOSTLES ON APPEAL.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Additional Testimony.....	4
Certificate of Clerk U. S. District Court to Supplemental Apostles on Appeal.....	82
Notice of Motion, Stipulation and Proposed Order Allowing Supplemental Record to be Filed.....	1
Order Allowing Mission Transportation & Re- fining Co. to File a Supplemental Apostles on Appeal, and Continuing Appeal to Octo- ber, 1913, Session.....	4
Reporter's Transcript.....	39
TESTIMONY ON BEHALF OF LIBELANT:	
HIGGINSON, W. H. (In Rebuttal).....	79
Cross-examination.....	80
TESTIMONY ON BEHALF OF CLAIM- ANT:	
FERRIS, FRANK ELWOOD.....	73
HEMMING, Jr., ROBERT BOYD.....	4
Cross-examination.....	21
Redirect Examination.....	47
Recross-examination... ..	48

Index.		Page
TESTIMONY ON BEHALF OF CLAIM-		
ANT—Continued:		
HEMMING, Sr., R. B.....		65
Cross-examination.....		70
McADIE, ALEXANDER G.....		62
Cross-examination.....		65
OLSON, OLAF.....		56
Cross-examination.....		59
Redirect Examination....		61
OLSSON, JOHN		51
Cross-examination.....		52

**[Notice of Motion, Stipulation and Proposed Order
Allowing Supplemental Record to be Filed.]**

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2262.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation, Claimant of
the Barkentine "FULLERTON," etc.

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
TION,

Appellee.

**NOTICE, STIPULATION AND ORDER FOR
FILING OF SUPPLEMENTAL RECORD.**

You and each of you will please hereby take notice that Mission Transportation and Refining Company, a corporation, appellant and cross-appellee herein, will on Monday, the fifth day of May, 1913, at the hour of 10:30 o'clock A. M., of said day, or as soon thereafter as counsel may be heard, move the above-entitled court for an order permitting said appellant to file a supplemental record herein in lieu of an order directing the diminution of the record on file in the above-entitled matter. Said motion will be made upon the ground that a material part of the testimony taken in the trial court in said action has been

2 *Mission Transportation & Refining Company*
inadvertently omitted from the record now on file in
this court.

Dated, San Francisco, California, May 3, 1913.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Said Appellant.

IT IS HEREBY STIPULATED AND
AGREED that the foregoing statement is true and
correct. It is further stipulated that the above-
entitled court may make an order permitting the fil-
ing of a supplemental record herein, as hereinbefore
prayed for, by Mission Transportation and Refining
Company, a corporation.

Dated, San Francisco, California, May 3, 1913.

J. E. FOULDS,

ANDROS & HENGSTLER,

LOUIS T. HENGSTLER,

Proctors for Southern Pacific Company, Appellee
and Cross-Appellant.

Pursuant to the foregoing Notice of Motion and
Stipulation of the parties hereto, IT IS HEREBY
ORDERED that Mission Transportation and Refin-
ing Company, a corporation, appellant and cross-
appellee herein, may have to and including the
thirty-first day of May, 1913, within which to file a
supplemental record herein.

Dated, San Francisco, California, May 5, 1913.

J.,

J.,

J.

[Endorsed]: No. 2262. In the United States Cir-
cuit Court of Appeals, for the Ninth Circuit. Mis-

sion Transportation and Refining Company, a Corporation, Claimant of the Barkentine "Fullerton," etc., Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Notice and Stipulation for Filing of Supplemental Record. Filed May 5, 1913. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifth day of May, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

[Order Allowing Mission Transportation and Refining Co. to File a Supplemental Apostles on Appeal and Continuing Appeal to October, 1913, Session.]

No. 2262.

MISSION TRANSPORTATION & REFINING
COMPANY, etc.,

Appellant and Cross-Appellee,

vs .

SOUTHERN PACIFIC COMPANY, etc.,

Appellee and Cross-Appellant.

4 *Mission Transportation & Refining Company*

On motion of Mr. Joseph A. McKeon, on behalf of counsel for the respective parties, and pursuant to the stipulation of counsel, this day filed, it is ORDERED that the Mission Transportation & Refining Company be, and hereby is allowed to and including the 31st instant within which time to file a Supplemental Apostles on Appeal in the above-entitled cause, and, on the further motion of Mr. McKeon, it is FURTHER ORDERED that the appeals in the above-entitled cause be, and hereby is continued to the October, 1913, session of the court.

Additional Testimony.

[Testimony of Robert Boyd Hemming, Jr., for Claimant.]

ROBERT BOYD HEMMING, Jr., called for the claimant, sworn.

Mr. CAMPBELL.—Q. What is your name, Mr. Hemming?

A. Robert Boyd Hemming, Jr.

Q. What is your present business?

A. I am the master of a motor boat at the present time.

Q. Were you employed on board the barkentine "Fullerton" at the time of the collision with the "Transit?" A. Yes.

Q. How long had you been previously employed on that boat?

A. I had been several months on that vessel.

Q. In what capacity were you acting at the time of the collision? A. As night watchman.

(Testimony of Robert Boyd Hemming, Jr.)

Q. Where was the "Fullerton" anchored at the time of the collision?

A. About abreast of the block between 17th street and 18th street.

Q. Will you indicate upon either one of the charts, Claimant's Exhibit 1 or 2, about where the "Fullerton" was.

A. It was about here, somewhere (pointing).

Q. Mark that with the letter "H." A. Yes.

Q. On Claimant's Exhibit 1?

A. It is about there, about very near on a line of Goat Island with Hunter's Point, and straight off from the block between 17th and 18th.

Q. What bearings, if any, have you used in locating the "Fullerton" at the point H?

A. A line between Goat Island and Hunter's Point drydock smokestack, and about straight off from 17th Street, or the block thereabouts.

Q. Will you look here to see whether the two points you refer to are on the map—is Goat Island marked on the chart? A. Yes; this is Goat Island.

Q. Where is Hunter's Point?

A. This is Hunter's Point, the [1*] smokestack is here (pointing).

Q. Is this the place that is marked Hunter's Point?

A. It is out here where the drydocks are on the end of that point.

Q. You say the "Fullerton" was anchored on a line between Goat Island and Hunter's Point?

*Page-number appearing at foot of page of original certified Record.

6 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

A. Very close to a line; yes.

Q. About opposite between 16th and 17th Streets?

A. 17th, or a little above 17th Street; on an ebb tide you can look up 17th Street from the stern end of the vessel.

Q. Which way would her stern be pointing on the ebb tide?

A. Close to north, maybe a little west of north, the stern would be pointing.

Q. Where did the forbidden anchorage extend?

A. At that time the forbidden anchorage, the most southerly line extended from the corner of 16th Street to the Alameda pier, I believe.

Q. Do you recall when you had anchored in that position, can you recall the date? A. No.

Q. What month was it during?

A. The latter part of September or October; somewhere along there, I think.

Q. How long, in your judgment, had you been anchored in that position prior to the collision?

A. We had been there ever since the vessel laid up; she anchored there and laid up.

Q. Don't you recall at this time what month it was that you anchored there?

A. I have some remembrance of being there during the month of October.

Q. Was the "Fullerton" ever changed from that anchorage either by the assistance of a tug or by the force of the wind or weather?

A. Not till after the collision.

(Testimony of Robert Boyd Hemming, Jr.)

Q. Were you on board the "Fullerton" at the time she was anchored? A. Yes.

Q. Do you remember what tug anchored her?

A. I have forgotten which one. [2]

Q. Were you in the courtroom this morning?

A. Yes.

Q. Did you hear the master of the "Transit" refer to a southeast gale in the month of December?

A. I heard him speak of it; yes.

Q. Have you a recollection of that gale?

A. We had several blows; I don't remember that we had the one he spoke of.

Q. Was the "Fullerton" ever blown from the former place of anchorage between the time that she was first anchored and the collision—was she ever shifted by the wind or current from the place of her first anchorage?

A. Not to my knowledge; she had the same bearings as when we dropped the anchor first; in dropping two anchors and heaving it up she might be shifted a few feet, but it is doubtful.

Q. How many anchors did you have aboard the "Fullerton"? A. Two anchors.

Q. Do you know what the weight of them were?

A. I think 3,000 pounds a piece.

Q. Have you any knowledge, yourself, certain knowledge, of the weights of those anchors—did you ever see them weighed?

A. I remember seeing them marked on the castings.

8 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

Q. What was the weight of them if you know?

A. I think 3,000 is marked on them.

Q. How much anchor cable did you have?

A. We always let out about 60 fathoms.

Q. What cable did you have on board, what length of cable?

A. We had one chain that had 70 fathoms and the other 90 or more.

Q. Which anchor did you have out that night?

A. The port anchor. [3]

Q. What length of cable did you have out?

A. I think we had 60 or 65 fathoms; 60 fathoms in the water.

Q. What was the depth of the water at that place?

A. In the vicinity of about 45 or 50 feet.

Q. In fathoms? A. About 8 or 9 fathoms.

Q. When the "Fullerton" was swinging to an ebb tide, so that her stern was nearest the fairway or forbidden anchorage, will you state whether or not she was anchored so near to the forbidden anchorage that she would swing into the same or near the southern edge of it?

A. She could not swing over the line between the 16th Street Dock and Hunter's Point with her stern; if she had all the cable she could not reach that by a long ways.

Q. Answer my question, please. When she was swinging to an ebb tide with all of her cable out, would she swing into the forbidden anchorage?

A. No.

(Testimony of Robert Boyd Hemming, Jr.)

Q. How far in your judgment was she from the southerly line of the forbidden anchorage extending from the 16th street dock to the Oakland mole?

A. Well, I should judge it would be half a mile.

Q. With what length of cable did you usually lay?

A. About 60 or 70 fathoms.

Q. What length of cable did you have out the night of the collision?

A. I don't remember exactly, but I think we had about 60 fathoms in the water.

Q. Who was on watch at the time of the collision?

A. I was on watch.

Q. What were the hours of your watch?

A. From sunset until sunrise.

Q. Who had the other watch? A. Olson.

Q. What type of a vessel is this boat?

A. Four-masted barkentine. [4]

Q. What was she used for? A. Carrying oil.

Q. From where?

A. From the coast to the Islands, and up and down the coast at that time.

Q. Why did you take the night watch and Olson take the day watch?

A. Well, there were several reasons; there was work to be done, such as painting, and the like of that, that he would do on his watch in the daylight.

Q. Why were you taking the night watch?

A. We had to have a night watchman to look after the lights and bell.

Q. What character of lights did you have aboard the vessel?

10 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

A. Ordinary ship-riding lights; about 8 or 9 inch lenses on them, or globes.

Q. What character of lights were they?

A. They were electric lights.

Q. Electric lights? A. Yes.

Q. Was the electricity generated aboard by means of a dynamo? A. Yes.

Q. Where was the dynamo and engine located?

A. Underneath the forecastle-head.

Q. Underneath the forecastle-head? A. Yes.

Q. Where was the riding light hung?

A. The riding light was hung on the forestay, above the windlass.

Q. That would be above the forecastle-head?

A. Yes.

Q. Where was the after light?

A. The after light was hung under the jigger-boom.

Q. That would be immediately over the cabin?

A. Yes, so it would show all around, above the cabin.

Q. What time did you go on watch the night of the collision?

A. I started the lights about 5 o'clock or at sun-down—a little before. [5]

Q. What kind of an engine was the dynamo run by? A. Gasoline.

Q. What attention, if any, did you have to give the gas engine?

A. I would fill up the lubricators about once every three or four hours.

(Testimony of Robert Boyd Hemming, Jr.)

The COURT.—Has that question any importance, the lights?

Mr. CAMPBELL.—Question has been made in the depositions that this man, because he was attending to the engine, was taken away from the duty of a lookout.

The COURT.—Very well.

Mr. CAMPBELL.—Q. Would you state whether or not the running of the engine requires your attendance in the engine-room? A. No, sir.

Q. How often did you have to go into the engine-room?

A. About every three or four hours to oil up.

Q. What time did the fog set in?

A. Around 11 o'clock, over where we was.

Q. Did you see the "Transit" when she left the Mission Bay slip on her 9 o'clock trip? A. Yes.

Q. The tide was flooding at the time of the collision? A. Yes.

Q. Will you state to the Court just what you did from the time the fog had begun to set in up to the time of the collision.

A. When the fog began to set in, that is, it had been foggy in the center of the bay around Goat Island, and up the bay quite some time before it got foggy where we were.

Q. Point out on the chart where that was.

A. The fog was thick up around this part here, and was gradually drifting down; about when the "Transit" left on the 9 o'clock trip, I saw her go into the

12 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

fog about here; but it remained clear down where we were until about 11 o'clock. [6]

Q. Go ahead and tell what happened and tell what you did.

A. It set in foggy around 9 o'clock, and I only rang the bell a few times and she lifted, the fog lifted; about 11 o'clock it started in setting in foggy, and I started in ringing the bell again.

Q. Where was this bell located?

A. The bell was located on the foremast of the ship.

Q. Go ahead. What did you do from that time on?

A. I heard the "Transit" approaching, what I believed to be the "Transit" from her whistle. I kept trying to look out for her, and kept striking the bell in between the whistles when I had a chance so as to give somebody on her a show to hear it. It was not very long after I heard her whistle that I saw the loom of her lights through the fog, and when she was about three ship-lengths away, I could see both of her range lights, one immediately after the other. She was approaching us on our starboard side just a little forward of amidship, it seemed, from where I was. Then she seemed to turn and cross our bow, and if I remember rightly, I heard two or three short blasts, like a short blast from a whistle. I struck the bell again, and it seemed that the collision was unavoidable, and I left the forecastle-head then because I was afraid that if she hit our headgear the yards

(Testimony of Robert Boyd Hemming, Jr.)

would drop down and the topmasts, and that was a dangerous place to be.

Q. How long intervened between the time that you left your fore-castle-head and the collision?

A. Well, that is hard to say, exactly how long.

Q. Was it a perceptible length of time?

A. I had time to go as far aft as the mizzen rigging, a little over two-thirds of the way back. [7]

Q. What was the position of the "Transit" when you left the fore-castle-head?

A. It was about a half a ship's length off our star-board bow.

Q. Which way was she coming?

A. She was coming right for us, and swinging to cross our bow all the time.

Q. Which way would her bow be swinging?

A. Her bow was swinging to starboard.

Q. Will you take these two models and show the position of the two vessels just at the time when you first saw them and secondly when you left the fore-castle-head?

A. Well, say, this is the "Fullerton" here, and I was on the vessel forward here; from where I looked the two range lights on the "Transit" appeared to be coming off about here.

Q. About abreast of your main rigging?

A. Between the fore and main rigging.

Q. Place the two models on the paper where you first saw her from you. A. About that.

Q. I want you to place these models on the paper

14 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

in the position of the two vessels when you first saw the range lights.

A. Well, they were quite a distance apart.

Q. I do not want you to show anything about the distance between them. I simply want you to show how the two vessels were heading.

A. About that.

Q. Is that right? A. Yes, about that.

Q. Where does the "Transit" carry her range lights?

A. They are above, higher than the wheel-house on each end.

Q. What kind of lights are they?

A. I don't know. I believe she had kerosene lights at that time.

Q. Are they colored lights or white lights?

A. White lights.

Q. How are they arranged—so that they are visible all around the horizon? [8]

A. Yes, except when the smokestack comes in between one, it would hide it.

Mr. CAMPBELL.—I will offer that in evidence. (The paper is marked Claimant's Exhibit 6.)

Q. I want you to show me the position of the two vessels at the time you left the forecastle-head.

A. It would be about that way.

Q. How far off from the "Fullerton" would you say that the "Transit" was at that time?

A. About a half or three-quarters of a ship-length.

Q. What would that distance be in feet?

(Testimony of Robert Boyd Hemming, Jr.)

A. About from 150 to 200 feet.

Mr. CAMPBELL.—I will offer that in evidence.

(The paper is marked Claimant's Exhibit 7.)

Q. Where were you stationed during the time the fog prevailed from 11 o'clock?

A. Sometimes I would walk the main deck, and sometimes on the forecastle-head.

Q. How could you ring the bell?

A. There was a bell-cord led across from the main mast to the railing on the forecastle-head.

Q. Main mast or fore mast?

A. From the fore mast to the railing on the fore-castle-head.

Q. When you were walking on the forecastle-head how would you ring the bell?

A. Get hold of the cord from the hand-rail.

Q. What was the distance of the bell on the fore mast from the fore-castle-head?

A. About 6 or 8 feet.

Q. When you were walking on the main deck where would you walk?

A. Across in front of the fore mast, across the deck forward of the fore mast.

Q. Just abaft the break of the fore-castle-head?

A. Yes.

Q. How would you ring the bell from that position? [9]

A. Reach up and catch the cord and ring it.

Q. Will you state whether or not you rang the bell during the time the fog prevailed after 11 o'clock.

16 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

A. Yes.

Q. How would you ring it, in what way?

A. I would ring it for about 15 to 25 strokes of the bell.

Q. What kind of strokes?

A. Ding-ding, ding-ding; like that.

Q. How often would you ring it?

A. About, as near as I could judge, once a minute.

Q. Did you hear the "Transit" approaching?

A. Yes.

Q. How long in your judgment did you hear her before the collision?

A. Well, I heard her blow about 3 or 4 blasts of her whistle before I saw her.

Q. How long prior to the time that you first heard her whistle had you been ringing the fog-bell?

A. From quarter to half an hour, something like that; a little over, maybe.

Q. Was there any time during that interval that you had not been ringing the fog-bell?

A. Not that I remember of.

Q. Have you a recollection that you did ring it or did not ring it? A. Yes, I rang the bell.

Q. Was there any time after the fog set in at 11 o'clock that you left the deck or the forecastle-head to go into the engine-room? A. No.

Q. When had you last oiled the engine?

A. At about 9 o'clock when the "Transit" left.

Q. When was the next hour for oiling?

A. Around 12 o'clock midnight.

Q. How many times during the period that you

(Testimony of Robert Boyd Hemming, Jr.)

were stationed aboard the "Fullerton" would you say that the "Transit" had passed back and forth across the bay? [10]

A. Well, to my knowledge she had a very irregular service there; sometimes she would make several trips a day and other times she only appeared to make about 3 trips, a day.

Q. How close would she pass to you on the different tides?

A. Well, that distance varied; at times she would come up so close that I had to haul my small boat up out of the way.

Q. On what tide would that be?

A. On an ebb tide.

Q. Which way *way* would the stern of your vessel be drifting?

A. The stern would be tailing to the northward.

Q. How close would she pass to you on the flood tide?

A. Well, sometimes she came up quite close even on the flood tide.

Q. During this night prior to the collision did you hear the 16th Street Mission Bay bell ring?

A. Not that night. I don't remember of hearing it before the collision.

Q. Had you had any fogs prior to the night of the collision? A. Yes.

Q. What had been your experience with the "Transit" coming close to you or passing you at a distance?

A. There was only once that she came very close to us in a fog before; then she crossed our bow when

18 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

we were laying at an ebb tide.

Q. Laying at an ebb tide? A. Yes.

Q. How far off, in your judgment, was the "Transit" when you first saw her?

A. Between three and four ship-lengths.

Q. I will ask you whether or not in your judgment if she had starboarded her helm at that time, with a flood tide, she could have gone under your stern?

A. I believe she could have gone clear of our stern easily.

Q. Were there any other vessels anchored in that vicinity? A. Yes. [11]

Q. What vessels?

A. There was the coal barge "Ruth."

Q. Where was she anchored?

A. She was anchored between our vessel and 16th Street.

Q. Where was she with respect to being ahead or astern of you?

A. She was lying—she would be lying ahead of us.

Q. Would that be nearer or farther away from the *the* fairway? A. Closer to the fairway.

Q. What other vessels were anchored there that night?

A. There were several small barges and the "Sonoma" and "Ventura," I think.

Q. Where were they anchored?

A. They were anchored between our vessel and the Risdon Iron Works and the sugar-house.

Q. Where were the "Sonoma" and the "Ventura" anchored with respect to the Union Iron Works?

(Testimony of Robert Boyd Hemming, Jr.)

A. One of them was very nearly abreast of the Union Iron Works.

Q. Where were the others?

A. The other one was closer up to the sugar-house.

Q. The sugar-house is farther south than the Union Iron Works? A. Further south.

Q. Did you see the steamer called the "Lansing" that night?

A. She was lying between our vessel and Hunter's Point.

Q. Between your vessel and Hunter's Point?

A. Yes.

Q. How far away from you was she lying?

A. About three-fourths of a mile, I should judge.

Q. Where was she with respect to the sugar-house?

A. She was a little to the southward of being abreast of the sugar-house.

Q. What was her direction with respect to your stern?

A. On the flood tide our stern pointed almost straight for the "Lansing." [12]

Q. Had your anchorage position been changed at all during the last two or three days preceding the collision?

A. Not enough to change our bearing.

Q. Was there any wind that night, Mr. Hemming?

A. There was a light breeze from the northeast.

Q. From the northeast? A. Yes.

Q. How was your vessel pointing on the flood tide?

A. Pointing very nearly north.

Q. How was the direction of the wind with respect

(Testimony of Robert Boyd Hemming, Jr.)

to the course of the "Transit"?

A. It was very nearly from the "Transit" toward us.

Q. Why was it that you left the forecastle-head, what was the reason for it?

A. I was afraid if she carried away our top gear that the top mast and yards would come down.

Q. Did you think at that time that a collision was unavoidable? A. Yes.

Q. Where was she anchored the next morning with respect to the anchorage of the previous night?

A. She was in the same place, or very close to it.

Q. Did you hear the statement of the first officer of the "Transit" in which he said she was anchored next morning off the sugar-house, to the southward of the Union Iron Works? A. Yes.

Q. Will you state whether or not that is correct?

A. He is mistaken there.

Q. Will you state whether or not if you had drifted to that position it would be necessary for you to have drifted past the "Sonoma" and "Ventura"?

A. To be abreast of the sugar-house I would have to pass both those vessels.

Q. Do you know the size of the bell that was on the "Fullerton"?

A. It was about a 9 or 10 inch bell. [13]

Q. Could you hear the paddle-wheels or any noise from the "Transit" as she approached? A. Yes.

Q. What noises did you hear?

A. The thumping of the paddle-bucket and the wash of the water under the bows.

(Testimony of Robert Boyd Hemming, Jr.)

Q. I will ask you whether or not the fog-bell on Mission Slip always rang during the fog.

A. There were times that I heard the boats going in there; they would have to blow several blasts to get the bell going before going into the slip.

Q. What kind of a bell was it, do you know?

A. I don't remember of seeing it. It must be a fairly good-sized bell—a bell rung by hand, I suppose.

Cross-examination.

Mr. HENGSTLER.—Q. How old are you, did you say, Mr. Hemming? A. 28.

Q. When were you first employed on the "Fullerton"? A. On June 10, 1909.

Q. On June 10, 1909? A. Yes.

Q. You remember that date distinctly, do you?

A. I am very certain of it.

Q. Where was the "Fullerton" at that time?

A. At the Union Iron Works.

Q. When did you first go on board of her?

A. To go to work on board of her?

Q. Yes.

A. Why, on that date at the Union Iron Works in the drydock.

Q. What was your business before June 10, 1909?

A. I was engineer and winch-driver on the "Santa Paula."

Q. Engineer and winch-driver employed on what?

A. On the barge "Santa Paula." [14]

Q. How long were you employed as such on that barge? A. Four years and about a month.

22 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

Q. You say that is a barge or a bark?

A. A barge.

Mr. CAMPBELL.—Q. A steam schooner?

A. A tow.

Mr. HENGSTLER.—Q. Has that barge any power of locomotion? A. No.

Q. It is a barge that can only move by its being towed? A. Yes.

Q. You say you were engineer on her and what else? A. Winch-driver.

Q. By “engineer” you mean what—what duties did you have to perform on that barge?

A. Run the engine and windlass for hoisting sails and anchors and pumps.

Q. That is the donkey-engine that is used on that barge? A. The same as the donkey-engine.

Q. For the purpose of loading and unloading, isn't it? A. Yes.

Q. Just running a donkey-engine, isn't it?

A. Yes.

Q. Had you ever been employed as a sailor before that on any vessel, either steam vessel or sailing vessel? A. Only on small boats about the bay.

Q. You have never been on deep-sea vessels, have you? A. Only those two.

Q. What ones?

A. The barge “Santa Paula” and the barkentine “Fullerton.”

Q. Those were the only large vessels that you have ever been employed on in any capacity, were they?

A. Yes.

(Testimony of Robert Boyd Hemming, Jr.)

Q. You are not a sailor, are you?

Mr. CAMPBELL.—What do you mean by a sailor?

Mr. HENGSTLER.—Q. You have never gone to sea?

A. Yes, I have gone to sea. [15]

Q. In what vessel?

A. In the "Fullerton" and the "Santa Paula."

Q. In the "Fullerton"? A. Yes.

Q. Whereabouts did you go in the "Fullerton"?

A. To Honolulu.

Q. Were you a member of the crew at the time you went to Honolulu on the "Fullerton"?

A. Yes.

Q. When was that?

A. That was in the first part of July, 1909; we landed in Honolulu on July 14th or 15th, 1909.

Q. Then you came back to San Francisco in her, did you? A. Yes.

Q. What did you do during the voyage, did you have to run an engine or what was your work?

A. Running the engine for getting up sails, and pumps for washing the decks, and the like.

Q. That was again running a small engine, was it not? A. Yes.

Q. A donkey-engine for the purpose of running the electric lights? A. Yes.

Q. But you have never had anything to do with navigation, have you?

A. In small boats I have.

Q. Small boats, what do you mean by that?

24 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

A. Well, in launches and yachts.

Q. About the bay? A. Yes.

Q. You say the "Fullerton" came to anchor in about October, 1909, in this bay?

A. About that time.

Q. Who gave you instructions at that time as to what you were to do on board of the "Fullerton"?

A. Captain Grant.

Q. Captain Grant did? A. Yes.

Q. What did he tell you?

A. That one man should keep the night watch and the other man the day watch.

Q. Is that all he told you?

A. That is all that I remember of. [16]

Q. Then you did that, you kept the night watch from the time you went on board until the time of this collision? A. Yes.

Q. How did you do that? What did you do when you kept the night watch?

A. Kept the lights clean and burning, rang the bell in case of fog; in case the wind should rise and there was danger of the ship dragging the anchor, letting go another anchor or pay out more chain, and when the wind went down, take up an anchor so as not to let the anchors get foul.

Q. Did you ever study the rules of navigation with reference to the lights which are required on a vessel? A. Yes, I have read the rules many times.

Q. When did you do that?

A. Several times when I have had copies of them. When I was in small boats, and at times when I was

(Testimony of Robert Boyd Hemming, Jr.)

at sea, if I had a copy of them I would look them over.

Q. What are the rules with reference to a vessel which is laying at anchor—what are the anchor lights prescribed by law?

A. A vessel of 150 feet and under has to have one light on the forward part of the vessel at a distance of about nearly 20 feet above the hull.

Q. Nearly 20 feet above the hull?

A. Yes. Over 150 feet she had to have a light forward and a light on or near the stern of the vessel to show all around the horizon; the forward must be not less than 20 feet and not over 40 feet on the beam of the vessel about the hull.

Q. How long have you known this rule, Mr. Hemming?

A. I could not say. I read the rules when I was in the small boats before I started going to sea; I started to go to sea in 1905.

Q. You mean by starting to go to sea going about the bay in these little launches?

A. No, going in the oil ships up and [17] down the coast, and I made a trip over to the Islands on the "Fullerton" when I was on her.

Q. It was at that time that you studied the rules with reference to anchor lights, was it, 1905?

A. Before that time, I remember of having one of these little copies of pilot rules and looking over it, seeing the rules for vessels at anchor in that.

Q. Did the captain instruct you as to what the rule was with reference to the anchor lights and to

26 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

look out for their position before he engaged you upon the "Fullerton"?

A. The place for the lights was always maintained there; the anchor lights were first put up by the mate of the vessel when she laid up.

Q. You never changed the anchor lights, did you?

A. No.

Q. They were electric bulbs that were fixed there when you first got there?

A. They were in lanterns, and you hoisted them up with a pulley to a block that was made fast.

Q. Did you do that?

A. Yes. If one of the globes burned out I would put in a new one and hoist the lamp up to where it belonged.

Q. Do you know how high the electric riding light in the fore part of the vessel was about the deck?

A. It looked to me about 20 feet above the windlass.

Q. About 20 feet; it might have been less, might it not?

A. Well, I could not say as to a couple of feet, but it is my opinion it was a good 20 feet.

Q. How high above the deck do you think the riding light, the anchor light of the "Fullerton" in the stern, was?

A. It was high enough above the poop deck to show above the captain's cabin, which was about as high as a man could reach [18] above the poop.

Q. With reference to the bell on the "Fullerton," was that same bell there when you first went on board

(Testimony of Robert Boyd Hemming, Jr.)

or has the bell been changed since that time?

A. The same bell was there.

Q. Do you know what the law prescribes with reference to the bell on a sailing vessel? Just say yes or no. A. Yes.

Q. You do? A. Yes.

Q. What is it? A. It must be over 8 inches.

Q. It must be over 8 inches in the kind of vessels of the size of the "Fullerton"? A. Yes.

Q. How long have you known that, Mr. Hemming?

A. I also learned that from the pilot rules.

Q. You also learned from the pilot rules that; you have also known that for years, have you?

A. Yes.

Q. What is the fog signal that the law prescribes in the kind of the vessels that the "Fullerton" is in foggy weather?

A. The bell has to be struck rapidly for about 5 seconds at intervals of not more than a minute.

Q. When did you first learn that?

A. Several years ago.

Q. You say you had never been on a sailing vessel as a night watchman before this—have you?

A. I have taken the night watch on the "Santa Paula" at odd times.

Q. While she was lying—

A. (Intg.) I would relieve somebody when she would be at anchor in the bay.

Q. When she would be at anchor in the bay?

A. Yes.

Q. Were you the regular night watchman at that

(Testimony of Robert Boyd Hemming, Jr.)

time or was somebody else the night watchman?

A. I would relieve the night watchman when he would go off for his supper, or sometimes would go ashore to get the captain, or something of that kind.

[19]

Q. Where was the bell located on the "Fullerton," just where? A. Just forward of the fore mast.

Q. Just forward?

A. Fastened to the fore mast.

Q. Was it set upon the deck or fastened in the rigging, or where was it?

A. It was on the mast itself.

Q. It was fastened on the mast itself? A. Yes.

Q. How high above the deck?

A. It was just a bit higher than the fore-castle-head.

Q. Just a bit?

A. A bit higher than the fore-castle-head; yes.

Q. A bit higher than the fore-castle-head, would that be within your reach? A. Yes.

Q. Would the clapper be within your reach?

A. The cord on clapper would.

Q. The cord on the clapper would be? A. Yes.

Q. How far down does that cord reach?

A. Well, the cord was about 10 feet long, 10 or 12 feet long, and of course there was bit of slack that would let it sag down so that you could reach it from the main deck or the fore-castle-head.

Q. Where did you usually stand when you used that cord for the purpose of ringing the bell, on the fore-castle-head or on the main deck?

(Testimony of Robert Boyd Hemming, Jr.)

A. Either place, whichever we chose; if it was blowing and raining and very cold, sometimes we would go behind the forecastle, where we would be a little sheltered, and we could look over each side and walk up on the forecastle at intervals.

Q. That night of the collision, where were you posted when you rang the bell after 11 o'clock [20]

A. On the forecastle-head and the main deck, both, at different times.

Q. Both at different times? A. Yes.

Q. You did not stay in one place?

A. No, I was walking the deck.

Q. You were walking the deck; what were you walking the deck for? A. To keep warm.

Q. How long did it take you to get up from the main deck to the forecastle-head?

A. It might be 2 or 3 seconds, about 7 or 8 steps.

Q. There are steps up or is it a ladder?

A. Steps.

Q. To what part of the forecastle-head did you have to go in order to ring the bell?

A. Just on the after part.

Q. Near the break or near the aft?

A. It is near the after part.

Q. Near the after part? A. Yes.

Q. How near the railing on the forecastle?

A. There was a railing across the deck, but you could keep your hand on it; you could walk back and forth across the forecastle-head.

Q. Was the rope of that bell anywhere near that railing? A. Fastened to the railing.

30 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

Q. It was fastened to the railing? A. Yes.

Q. How near to the steps between the main deck and the forecastle-head was the rope?

A. About 15 feet.

Q. About 15 feet. It was nearer to the port side, was it, to the port railing?

A. It came over a little nearer the starboard railing than amidship.

Q. The steps went up on the port side?

A. On both sides; steps on each side. [21]

Q. Now, you sometimes used one rope and sometimes you used the other rope—

A. We used the same rope.

Q. You used the same rope? A. Yes.

Q. But you were in two different positions, weren't you, when—

A. (Intg.) On the forecastle-head you used the end where it was fastened to the rail and on the main deck you took the slack and used it.

Q. It is the same rope? A. The same rope; yes.

Q. Did your engine require any attention during that time? A. Not that night.

Q. If it had required any attention you would have had to go into the engine-room?

A. I would have had to light the oil lights and called the day watchman out.

Q. You would have had to light the lights and called the watchman out?

A. Call him out to light them or light them myself.

Q. In the meantime there would not have been any lights on board, if that had happened?

(Testimony of Robert Boyd Hemming, Jr.)

A. Not until I had the oil lights hoisted up.

Q. Whereabouts were those oil lamps?

A. They were in the cabin.

Mr. CAMPBELL.—What has that to do with it; you have admitted already the lights were burning.

Mr. HENGSTLER.—I want to show that this man had too many duties to perform to be able to perform any of them properly.

Mr. CAMPBELL.—Go ahead.

Mr. HENGSTLER.—Q. I have forgotten what the captain told you when he instructed you in relation to your duties. What did he say to you?

A. He said one of us was to keep [22] the night watch and the other the day watch on the vessel.

Q. Then you arranged it between yourself that you were going to keep the night watch? A. Yes.

Q. What time that night did you go on watch?

A. When I lighted the lights I considered I was on watch; we were both on board the vessel.

Q. What time was it that night, if you remember?

A. Just a little before sun down, around 5 o'clock, or a little earlier.

Q. Where was the other man at about 11 o'clock, do you know? A. He was in his room, I believe.

Q. On the lower deck?

A. He was in the aft part of the vessel somewhere.

Q. Was there anybody else on board of the "Fullerton" at about 11 o'clock that night? A. Yes.

Q. Who was there?

A. My father was on board.

Q. Your father was on board; had he any duties on

32 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

board of that vessel to perform? A. No.

Q. What was he doing there?

A. He had been visiting me that day.

Q. When did he come on board?

A. I don't remember whether it was that same day or the day before.

Q. Where was he at 11 o'clock?

A. He was some place in the cabin aft.

Q. When did you leave your father—when did you last see him that evening?

A. As near as I remember, it was around 9 o'clock or a little after that he went to bed.

Q. Up to that time, till 9 o'clock, where were you, were you together?

A. We had been around the after deck talking together.

Q. Do you know whether or not he was on deck after 11 o'clock? [23]

A. I didn't see him until the time of the collision.

Q. Was he dressed when you first saw him?

A. I believe he had his clothes on.

Q. He had his clothes on. How soon after the collision did you see him? A. A very short time.

Q. A minute or two after the collision?

A. Just a very few moments.

Q. Where was he?

A. He was on the poop deck aft.

Q. On the poop deck? A. Aft.

Q. Dressed at that time?

A. I don't remember just how he was dressed, but he had some of his clothes on.

(Testimony of Robert Boyd Hemming, Jr.)

Q. Are you certain, Mr. Hemming, that your father was not with you at 11 o'clock, between 11 and half-past 11 in the forward part of the "Fullerton"?

A. He was not with me until after the collision.

Q. You are positive of that, that he was not with you at the time of the collision?

A. From the time he went to bed, which was around 9 o'clock, until the time of the collision, I did not see him.

Q. You did not see him until the time of the collision? A. No.

Q. You are positive he was not there just before the collision? A. He was not.

Q. What time on that evening before did you take your dinner?

Mr. CAMPBELL.—The same night or the night before?

Mr. HENGSTLER.—Q. The same night the collision happened?

A. I believe it was just after I hung the lights up we had dinner. I am not certain which; just before or just after.

Q. What time about would that be?

A. If it was after, which I believe it was, I believe that I came from putting the lights out and went right to dinner, had supper; that would be shortly [24] after 5 o'clock.

Q. Where did you take your dinner—up on the poop deck? A. In the galley.

Q. On board the "Fullerton"? A. Yes.

Q. Did you always take your meals aboard the

34 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

“Fullerton” or did you sometimes go ashore?

A. We cooked our own meals aboard there.

Q. Regularly? A. Yes.

Q. Once in a while you went ashore to take your meals?

A. Not to take my meals unless it would be that we might be visiting ashore, or something like that.

Q. Mr. Hemming, when you were engaged in the engine-room, you could not attend to the bell at the same time, could you?

A. Well, if the bell needed attention I would have to call on the day watchman to be up at the same time.

Q. During the two months or so when you were there as night watchman how often did you have occasion to call the other watchman up in case you had to go into the engine-room?

A. I don't remember of ever having to do that to help me with the engine; but when we would let go two anchors or in getting them up I would.

Q. You had sometimes to change the anchors during your watch at night, did you? A. Yes.

Q. Whenever you had to do that you would call him?

A. I would have to have the day watchman to help me.

Q. When did you change anchors?

A. If I had to use two anchors, when the weather was rough, when the tide turned I had to take up one of the anchors so it did not foul the other one.

Q. Did you make any change in the anchors on the night of the [25] collision before the collision

(Testimony of Robert Boyd Hemming, Jr.)

happened? A. No, not that I remember of.

Q. You are sure no change was made in your anchors that night?

A. I am quite certain, because the weather was quite calm.

Q. The changes in the tide did not make it necessary to make any change in your anchors?

A. No, we had only one anchor down.

Q. How far from the shore, do you think, the "Fullerton" was lying at anchor upon the evening of the collision?

A. Well, in my judgment it would be about a mile and a quarter or a mile and a half off of the Union Works dock.

Q. About a mile and a half?

A. Or a mile and a quarter.

Q. Off the Union Iron Works dock? A. Yes.

Q. That was the nearest point to the shore, was it, the Union Iron Works dock?

A. That was about—it was about as near as 16th street; they were about an equal distance.

Q. You would think, then, that you were from the shore at 16th street about a mile and a half away?

A. About that.

Q. How often did you take the bearings that you mentioned from Goat Island to Hunter's Point?

A. Well, if we had bad weather and it was blowing, I used to take a look at our bearings to see whether she had started to drift, or after a blow, if I changed anchors I would look to make sure she was in the same place.

(Testimony of Robert Boyd Hemming, Jr.)

Q. Were you instructed by the captain to see that she remained in the same place?

A. Yes, that was understood in keeping the watch, that is what we were keeping the watch for, the anchor watch.

Q. But the captain did not tell you that expressly to see to it that she remained in the same place, did he? [26]

A. No, because he understood that I knew enough to do so.

Q. That is your surmise; he did not say anything about that, did he, that you should look out that she remain in the same place?

A. At different times he told me that if the weather got rough to let go both anchors; he instructed me at different times about that that I remember of.

Q. How often did he come on board during those two months?

A. Well, he generally made it a rule to come on board every day except when his wife was sick; sometimes he stayed away for a day or two.

Q. When he came on board, do you know whether or not he took the bearings of the vessel?

A. I believe that he did; it is generally customary to do so.

Q. That is the captain's business, isn't it, to look out for the anchorage?

A. To look out for the ship in general; yes.

Q. And he did that about once a day, did he not?

A. Yes.

Mr. CAMPBELL.—Did what? Came aboard.

(Testimony of Robert Boyd Hemming, Jr.)

Mr. HENGSTLER.—Came aboard and saw whether or not the “Fullerton” had changed her position and took the bearing.

Q. How did you take these bearings—with an instrument, or just with your eye? A. Just by eye.

Q. Just by your eye? A. Yes.

Q. Are you practiced in that?

A. Getting the range?

Q. Yes.

A. I believe I could do very well at it.

Q. You mean that only approximately, don't you, from Goat Island to Hunter's Point, that you were about in a line between Goat Island and Hunter's Point—by that you mean approximately, don't you?

A. As near as you could see by your eye. [27]

Q. You don't mean to say exactly?

A. As near as you could see by your eye.

Q. Did you ever notice a change in the position of the “Fullerton” at any time when you were taking these bearings in the course of the two months?

A. A change in her position?

Q. Yes.

A. It was according to the setting of the tide; it would make a slight difference; you would make an allowance for that; if the wind happened to be blowing off the shore, you would be a little outside of the line, and if towards the shore, it would be inside of the line; but generally the vessel laid between those points.

Q. But she did drift, did she not, in the course of

38 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

the two months?

A. Only what she would swing on the length of her chain; she did not change her bearings; that is, to be perceptible.

Q. That is not it; of course, I know that she swings according to the tide, and the location on the flood tide is different from the exact point where she is on the ebb tide; but apart from that, didn't she drift considerably during the two months when you were lying there at anchor?

A. She never dragged her anchors to my knowledge.

Q. Not to your knowledge? A. No.

Q. You are not sure whether she did or not?

A. I am quite certain, because she would have been out of the position where she always remained if she had dragged them to any extent.

(An adjournment was here taken until Monday, January 20, 1913, at 10 A. M.)

[Endorsed]: Filed May 12, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [28]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

Hon. F. S. DIETRICH, Judge.

No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corporation,

Libelant,

vs.

Barkentine "FULLERTON," Her Tackle, Apparel
and Furniture,

Defendant.

Monday, January 20th, 1913.

Reporter's Transcript.

ROBERT BOYD HEMMING, Jr., cross-examination, resumed.

Mr. HENGSTLER.—Q. Mr. Hemming, what kind of a vessel is the "Fullerton"—iron or wooden?

A. A wooden vessel.

Q. A wooden vessel? A. Yes, sir.

Q. Now, I want to ask you to draw a diagram showing the position of the bell which you used on the "Fullerton" in relation to the place where you stood when you struck the bell. Will you draw it here as well as you can? A. Yes, sir.

Q. Will you please mark the place where the bell is "A"? A. Yes, sir (marking).

Q. It is attached here to the fore mast?

A. To the fore mast; that is the fore mast.

(Testimony of Robert Boyd Hemming, Jr.)

Q. Will you mark the place on deck at the fore mast "B"?

A. Yes, sir, that would be the deck below that.

Q. Just mark the place on the main deck where the fore mast [29] meets the deck "B"?

A. Yes, sir (marking).

Q. How long is the main deck? Draw that line through.

A. You cannot see the main deck through the bulwarks; there is a line through it.

Q. How high are the bulwarks above the deck?

A. Well, about three or four feet.

Q. About three or four feet? A. Yes, sir.

Q. That is the distance from the point "B" to the point "C" would be about three or four feet, would it? A. Yes, sir.

Q. How high is the bell from the point "B" or from the point "C," whichever you prefer to give us?

A. Well, I would just about be able to touch the bell by reaching my full height.

The COURT.—Q. From the deck?

A. Yes, sir.

Mr. HENGSTLER.—Q. That would be how high?

A. I could very near reach the bell.

Q. How tall are you, Mr. Hemming?

A. About five foot nine, or five foot ten.

Q. Would you say the bell is about six feet and a half above the main deck?

A. It is higher than that.

Q. Seven feet?

(Testimony of Robert Boyd Hemming, Jr.)

A. I could not say exactly; it is about that, as I remember.

Q. About seven feet?

A. In the neighborhood of seven.

Q. From the bell extended a rope? A. Yes, sir.

Q. What was that rope attached to, the end nearest to the bell?

A. It was attached to the clapper of the bell.

Q. It was attached to the clapper of the bell?

A. Yes, sir.

Q. What part of the clapper was it attached to, the upper or lower part?

A. The upper part; there is an eye in the lower part of the clapper which it was tied in.

Q. How heavy a rope was that?

A. A cord about as thick as my finger; I guess somewhere around three-eighths or one-half of an inch. [30]

Q. What was the distance from the point "C" to the break of the forecastle?

A. I should judge about eight feet.

Q. About eight feet?

A. Yes, sir, I should judge.

Q. Will you mark the point where the break of the forecastle meets the main deck, "D"?

A. Yes, sir, that is the most aft part of it.

Q. This is meant to be the aft part of the fore-castle?

A. That is the most aft extension of it.

Q. Mark that point "D"?

A. Yes, sir (marking).

(Testimony of Robert Boyd Hemming, Jr.)

Q. And mark the point of the forecastle above "D," mark it "E," the point where the break meets the forecastle-head. I do not want you to include the railing of the forecastle-head. This is the point, is it not, where the break of the forecastle-head meets with the forecastle? (Pointing.)

A. That is the most aft part of the forecastle-head. That is the deck of the forecastle-head.

Q. That is the point "E," is it not?

A. Yes, sir.

Q. Now, how high is the line D-E. How high is the forecastle-head above the main deck?

A. As near as I can remember, I could lap my finger by standing on that deck, but of course I could not pull anything off that high up.

Q. In other words, standing on the main deck you can just reach up to the forecastle-head?

A. Yes, sir.

Q. Therefore, the height of D-E is a little less than the height of B-A, is it not? A. Slightly less.

Q. About how much higher than the forecastle-head is the bell, "A"?

A. Well, as near as I remember it would be in the neighborhood of a foot.

Q. In the neighborhood of a foot? A. Yes, sir.

Q. Now, there is on the forecastle-head a railing, is there not? A. Yes, sir.

Q. On both sides of the forecastle-head?

A. Both sides and [31] across the back.

Q. And across the back? A. Yes, sir.

Q. How high is that railing?

(Testimony of Robert Boyd Hemming, Jr.)

A. About two foot six.

Q. Two foot six? A. Yes, sir.

Q. And to what part of that railing is the other end of the rope attached?

A. It was attached further forward than the aft extension. The aft extension of the forecastle-head covered the engine and the rope was led in here to about the second stanchion on the railing from the most aft part of the railing.

Q. On the port side or the starboard side?

A. Very close to amidships; this extension was amidships.

Q. I do not understand you. Did the railing run amidships?

A. There was an extension amidships from the forecastle-head.

Q. There was an extension amidships from the forecastle-head? A. Yes, sir.

Q. You could stand on that, could you?

A. I could walk out on that.

Q. And there was a railing on that extension?

A. Yes, sir, running around that extension.

Q. There was a railing running around that extension? A. Yes, sir.

Q. That railing was not amidships, was it. It ran across the vessel?

A. The port side of the extension was nearly amidships.

Q. The port side of the extension was nearly amidships? A. Yes, sir.

Q. Was it nearer to the port side of the vessel?

44 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

A. Slightly to the starboard of the middle of the vessel.

Q. That extension of the forecastle-head was entirely on the starboard side of the forecastle-head, was it? A. On the starboard side amidships.

Q. On the starboard half of the forecastle?

A. Yes, sir.

Q. And the end of the rope was attached to the railing which [32] was on the extension?

A. Yes, sir.

Q. Where were the steps which led up from the main deck to the forecastle-head?

A. This set of steps went up between the extension of the forecastle-head and the bulwarks on the starboard side.

Q. They went up from the main deck, didn't they?

A. Yes, sir.

Q. You marked them here as going up from the bulwarks?

A. You cannot see them through the bulwarks here.

Q. Suppose you extend them down.

A. Right down to here, to "D," to the foot of the aft extension of the forecastle-head.

Q. The steps, therefore, are from "F" to "G" on the diagram? A. Yes, sir.

Q. Now, when you went on those steps, you went to the forecastle-head, you do not come out on the extension, but you come out on the forecastle-head itself, don't you, at the point "G"? When you get up on the forecastle-head you do not get out on the

(Testimony of Robert Boyd Hemming, Jr.)

extension but you get out on the forecastle-head itself? A. At the corner of the extension.

Q. Then to get from that point where you reach the forecastle-head to the point where the bell is, you have to walk back, you have to walk out on the extension?

A. A distance of about six feet to the aft part.

Q. In other words, the line "G"—"E" is six feet, is it not? A. About that.

Q. Now, the line "B"—"E," you said, was how long—the distance from the fore mast to the break of the forecastle-head is how long?

A. In the neighborhood of eight feet.

Q. That is to the extension, is it not?

A. Yes, sir.

Q. And the height of the forecastle-head above the main deck, if you can just reach it, would be about seven feet. You said you could just reach it?

A. I could just about put my fingers, [33] a part of my hand on the top.

Q. You think that would be about seven feet. You have said so? A. That is a close guess.

Q. Now, when you pull the rope, Mr. Hemming, you do not strike both sides of the bell with the clapper, do you? You only strike one side of the bell with the clapper?

A. Unless you should let the clapper fly back to hit the other side.

Q. Which way do you do? Do you let the clapper fly back or do you pull it one way?

A. By pulling it one way it makes the most noise

46 *Mission Transportation & Refining Company*
(Testimony of Robert Boyd Hemming, Jr.)

with the bell, which I did from the forecastle-head.

Q. From the forecastle-head you pull it one way and that gave one sound and then you pull it again and that gave another sound. That is the way you did? A. Every time you pull it it rang the bell.

Q. When you were standing on the main deck you reached up to the slack of that rope?

A. Yes, sir.

Q. And pulled it that way? A. Yes, sir.

Q. In that case how did the clapper strike, on one side or both sides? A. Just as you choose.

Q. Which way did you choose?

A. It would sound the hardest by pulling it one way. You would have to pull the arm too far to sound both sides and make it sound quickly.

Q. Before the collision you ran from the forecastle-head down on the main deck and you go back as far as the mizzen rigging, did you not?

A. Yes, sir, I left the forecastle-head just previous to the time of the collision.

Q. On which side of the vessel did you run back?

A. I came along the starboard side.

Q. On the starboard side? A. Yes, sir.

Q. That was the side on which the "Transit" was approaching you? A. Yes, sir.

Q. Was there anything in your way as you ran back? Did you have to go around any house or any structure on the ship? [34]

A. The deck was clear along the starboard side.

Q. Is there a kind of alleyway there?

A. Yes, sir.

(Testimony of Robert Boyd Hemming, Jr.)

Q. You ran along that, did you? A. Yes, sir.

Q. Was there anything in your way as you ran along that you had to get over?

A. Nothing that I remember of.

Mr. HENGSTLER.—That is all.

Redirect Examination.

Mr. CAMPBELL.—Q. Mr. Hemming, just one or two questions. Do you hold any license at the present time from the United States Government?

A. Yes, sir.

Q. What character of license?

A. I hold a license for operating motor vessels and an engineer's license for marine gas engines.

Q. You say a license for operating motor vessels?

A. Yes, sir.

Q. In what capacity?

A. Captain of motor vessels carrying passengers for hire and other work.

Q. What do you mean by motor vessels?

A. A vessel propelled by engines other than steam; electric and so forth.

Q. Some question has been made about your sea experience, and you said that you had been in the "Santa Paula." How large a vessel is the "Santa Paula" compared with the "Fullerton"?

A. She is a vessel about one-half the size or a little larger perhaps.

Q. What trade was she used in?

A. In the oil trade on the coast.

Q. Between what ports did she ply when you were in her?

48 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

Q. San Diego, San Pedro, Eureka, Portland, Astoria, Tacoma and Seattle.

Q. How long were you in her?

A. Four years and about a month.

Q. Where did the "Fullerton" ply during the period of your service in her?

A. To San Diego, San Pedro, Ventura, Port San Luis, San Francisco, Portland, and I believe Seattle and Honolulu.

Mr. CAMPBELL.—That is all. [35]

Recross-examination.

Mr. HENGSTLER.—Q. How large a vessel is the "Fullerton," Mr. Hemming?

A. She is 1400 and some odd—1492.

Q. Do you know her dimensions?

A. I believe she is 235 feet over all.

Q. 235 feet is her length? A. I believe so.

Q. You do not know the other dimensions, do you?

A. I have a remembrance that she has a 42 foot beam.

Q. And how wide?

A. 42 foot—41 or 42 feet wide.

Q. She is a very large vessel, is she not?

A. She is a medium sized sailing vessel.

Q. She has 4 masts? A. Four.

Q. Would you call a four-masted sailing vessel—would you call her a very large sailing vessel?

A. What is called a large sailing vessel is two or three times her size.

Q. Are there any larger sailing vessels here on the coast than the "Fullerton"?

(Testimony of Robert Boyd Hemming, Jr.)

A. In the coast trade, you mean?

Q. Yes, in the coast trade?

A. I don't say that I can name them just now.

Q. You do not know of any, do you? When you speak of a sailing vessel that is two or three times the size of the "Fullerton" what sailing vessel are you thinking of?

A. Vessels such as the Standard Oil Company have packing oil out to China.

Q. Mr. Hemming, how long have you had that license as a captain of motor boats?

A. I don't remember when I took that out.

The COURT.—Q. About?

A. About two years ago; I think.

Mr. HENGSTLER.—Q. About two years ago. You got it after this collision, didn't you?

A. Yes, sir, just after that.

Q. When you were in the "Santa Paula" you were there as donkeyman, weren't you—all the time you were in the "Santa Paula" you were running the donkey-engine? That was your duty, was it not?

[36]

A. Running the engine for the windlass and pump and electric lights and so forth.

Q. That is what they call the donkeyman, is it not?

A. In most vessels that would be classed the same as the donkeyman or pumpman.

Mr. CAMPBELL.—Just one question.

Q. Will you state whether or not the fore-castle-head deck is flush with the deck with the extension from the fore-castle-head?

(Testimony of Robert Boyd Hemming, Jr.)

A. That is flush. It is one and the same thing.

Q. The forecastle-head deck stands back of the extension? A. Yes, sir.

Mr. HENGSTLER.—Q. From the rear part of it to the fore part of it it rises gradually, does it not?

A. Only with the sheer of the ship.

Q. There is a gradual rise towards the bow sprit?

A. Not more than the sheer of the ship.

Q. The sheer of the ship is of that kind that there is an elevation of the fore part of the forecastle-head as compared with the aft part of the forecastle-head?

A. There is a slight incline to it.

Mr. CAMPBELL.—Q. Was that incline sufficient to obstruct the range of the sound from this bell?

A. I don't believe it was. The bell could have as well been put here if I had.

Mr. HENGSTLER.—Q. You could not tell that for certain as to whether it obstructed it, or not. You never have actually watched that, have you?

A. It was apparent that vessels always heard the bell in foggy weather.

Q. I did not ask you that. That is all.

Mr. CAMPBELL.—Q. Just what was your rating in the "Fullerton." What were you called on board the "Fullerton"? A. Engineer.

Mr. HENGSTLER.—Q. That is rather unusual to be called an [37] engineer on a sailing vessel, is it not, Mr. Hemming?

A. They call the handy man the engineer, as a rule.

Mr. HENGSTLER.—That is all.

[Testimony of John Olsson, for Claimant.]

JOHN OLSSON, called for the claimant, sworn.

Mr. CAMPBELL.—Q. What vessel, if any, were you master of in September, 1909?

A. The tug “Restless.”

Q. By whom was she owned?

A. She was owned by J. B. Spreckels & Brothers, but the Red Stack Towboat Company operated her at the time.

Q. What is the name of the Red Stack Towboat Company?

A. The Shipowners and Merchants’ Towboat Company.

Q. Did you at any time during the month of September, 1909, anchor the barkentine “Fullerton” in the bay of San Francisco? A. Yes, sir, I did.

Q. Were you then acting in the capacity of master of this tug, the “Restless”? A. Yes, sir.

Q. Do you remember the date that you anchored her? A. No, sir, I do not.

Q. Do you know whether or not it was in the month of September?

A. Yes, sir; I believe it was in the month of September, 1909.

Q. How long had you been plying as a tugboat captain? A. At that time?

Q. Yes. A. Six or seven years.

Q. Were you familiar with the forbidden anchorages in San Francisco Bay? A. Yes, sir.

Q. Where did the most southern line of the forbidden anchorage extend?

(Testimony of John Olsson.)

A. It extended at the south of the 16th street wharf.

Q. To where?

A. To the light-house in Oakland Creek, or the entrance to Oakland Harbor.

Q. Alameda mole? A. Yes, sir. [38]

Q. Where with reference to the southern line of the forbidden anchorages did you anchor the "Ful-lerton"?

A. Oh, about, I should think—you mean the distance?

Q. Did you anchor it north or south of the southern end? A. South of the southern end.

Q. Anchoring south of the southern end will you state whether or not she was within the forbidden anchorage?

A. She was clear of the forbidden anchorage.

Q. How far, in your judgment, was she anchored south of the forbidden anchorage?

A. I should think where her anchor was dropped—it must be 3,500 feet from where her anchor was dropped. It might be between 1,500 and 2,000 feet.

Q. If she was anchored with 60 fathoms of cable out, could she swing in the forbidden anchorage in an ebb tide?

A. No, sir; she was not swinging in the forbidden anchorage.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Olsson, are you now

(Testimony of John Olsson.)

employed by the Tugboat Company, the Shipowners and Merchants' Tugboat Company?

A. No, sir.

Q. What is your business now?

A. I am master of the tug "Arabs," of the Pacific Mail Steamship Company.

Q. When were you first asked to come here and testify in this case?

A. Oh, it is about two years ago; a year and a half ago.

Q. A year and a half ago? A. Yes, sir.

Q. That was the year after the collision?

A. About that; yes.

Q. When you were in the employ of the tugboat company you anchored a good many vessels, didn't you? A. Yes, sir.

Q. In the course of that year? A. Yes, sir.

Q. Yet you are able to remember the exact circumstances of this particular anchoring?

A. Yes, sir, I am.

Q. Do you remember all the vessels that you anchored in the bay during the year 1909?

A. No, sir. [39]

Q. You do not remember all of them?

A. No, sir.

Q. You remember some of them, do you?

A. This particular case I do remember, because that morning afterwards there was a collision. It came to my mind then.

Q. It came to your mind then?

A. Through the collision that the "Fullerton" was

54 *Mission Transportation & Refining Company*

(Testimony of John Olsson.)

in with this ferry-boat.

Q. Who did you talk it over with at the time when it came in your mind?

A. I saw it in the paper, I guess; I don't know if I talked with anybody. I may have seen it in the paper.

Q. You saw it in the paper? A. Yes, sir.

Q. Then you remembered that you anchored the "Fullerton" 1,500 feet from the forbidden anchorage? A. Yes, sir, fully that.

Q. In that particular stop?

A. Yes, sir, well clear of the forbidden anchorage.

Q. Is the "Fullerton" the only vessel about which you have such a clear memory of all those you anchored in the bay of San Francisco?

A. I don't know; sometimes we have a way of remembering them by one thing and another. It is pretty hard to remember all of them in port.

Q. It would be very hard to remember when you do so much work?

A. Yes, sir, when the ship is anchored you forget all about it.

Q. You do not keep a written memorandum?

A. Yes, sir.

Q. Of the position where you anchored the vessel?

A. Not the position, just the time.

Q. Do you do that or does the office of the ship company do it?

A. The office of the Shipowners and Merchants' Towboat Company does it as well as the captain. We do not put the place where we anchor; sometimes we

(Testimony of John Olsson.)

would say about 16th, or about Folsom, or off Meiggs.

Q. Are you sure at the time when you anchored the "Fullerton" she was not anchored in the forbidden anchorage? [40]

A. Yes, sir, I am sure of that.

Q. You are sure of that?

A. That is in the Southern Pacific fairway. She may have been anchored close to the Western Pacific.

Q. How do you know that she was not in the Western Pacific fairway?

A. I do not know that it was established at the time.

MR. CAMPBELL.—We think that that is immaterial.

A. It was not established at the time.

MR. HENGSTLER.—How do you know it was not established at the time?

A. Because the Western Pacific had a car ferry running at the time over to the slip and the slip was not finished; they were working on the slip at the time, building it.

Q. When was the new anchorage zone established?

A. For the Western Pacific, you mean?

Q. Yes. A. I cannot exactly say.

Q. Do you know whether it was in September, 1909?

A. The first time I heard about it was when I was in the tugboat and they furnished us with a chart of the forbidden anchorage on a small scale.

the "Fullerton" was anchored? A. Yes, I am.

Q. And you are positive that it was after the time

(Testimony of John Olsson.)

Q. Are you sure of that?

A. About six months.

The COURT.—Why is this important?

Mr. HENGSTLER.—I am testing his memory. He has such a wonderful memory of these matters. As a matter of fact, the Western Pacific anchorage was established three days after the collision.

Mr. CAMPBELL.—This chart was issued in March, 1910.

The COURT.—You may proceed.

Mr. HENGSTLER.—It was, as a matter of fact, established three days afterwards. You can read that in the rules of the Harbor Commissioners. [41]

Mr. CAMPBELL.—We stipulated that this chart was not sent out by the board until March, 1910.

Mr. HENGSTLER.—You don't remember the date when the "Fullerton" was anchored?

A. No, sir.

[**Testimony of Olaf Olson, for Claimant.**]

OLAF OLSON, called for the claimant, sworn.

Mr. CAMPBELL.—Q. What is your present business, Mr. Olson?

A. I am in the Union Oil Company.

Q. On board what vessel? A. "Fullerton."

Q. Were you on board the "Fullerton" at the time she was in collision with the "Transit"?

A. Yes, sir.

Q. In what capacity were you employed on board?

A. Day watchman.

Q. What were your duties as day watchman?

(Testimony of Olaf Olson.)

A. To watch the ship and ring the bell in the fog.

Q. Did you have to do any work around the decks or anything of that sort?

A. Clean the deck and things like that; working around the ship in fine weather.

Q. Were you on board the "Fullerton" at the time of the collision? A. I was.

Q. Where were you?

A. I was turned in my bunk.

Q. Where was your bunk?

A. In the steerage aft.

Q. Where is the steerage aft, on what deck?

A. Right on the main deck.

Q. On the main deck? A. Yes, sir.

Q. On which side of the cabin?

A. Starboard side.

Q. Was there any window in the stateroom?

A. There was one.

Q. What do you call that? A. Port.

Q. Which side did that open out on?

A. The starboard side.

Q. Were you awake or asleep at the time of the collision? A. I had been shortly before.

Q. What was it that caused you to wake, if anything? A. The [42] "Transit's" whistle.

Q. Do you know whether or not the bell on board the "Fullerton" was ringing?

A. The bell on the "Fullerton" was ringing.

Q. Was ringing? A. Yes, sir, was ringing.

Q. What noise did you hear when you awakened?

58 *Mission Transportation & Refining Company*

(Testimony of Olaf Olson.)

A. The noise from the "Transit" paddle-wheels and the whistle.

Q. How often would you hear the bell of the "Fullerton's"?

A. The bell on the "Fullerton," about every minute was ringing.

Q. Did you see the "Transit" at all?

A. Seen her. I looked out through the port hole.

Q. What could you see of her?

A. Her range lights.

Q. Where did she look to be to you?

A. About three or four points on the bow.

Q. On the starboard bow?

A. The starboard bow.

Q. Of the "Fullerton"? A. Yes, sir.

Q. What way was she headed?

A. Broadside to the "Fullerton."

Q. What do you mean by broadside to the "Fullerton"?

A. Keeping on the course she was going she would have struck the main rigging.

Q. If the "Transit" kept on the course she was going she would have struck the "Fullerton's" main rigging? A. Yes, sir.

Q. What did you do after the collision?

A. I run up on deck and gave a hand to making the "Transit" fast; took the lines from her.

Q. Where was the "Transit" at the time you got on deck? A. She went across our bow.

Q. Are you positive, or is it merely a matter of guesswork that the "Fullerton's" bell was ringing in

(Testimony of Olaf Olson.)

that fog? A. The "Fullerton's" bell was ringing.

Q. Mr. Olson, do you know whether or not the "Fullerton" drifted to any extent after the collision?

A. No, sir, she did not drift. [43]

Q. She did not drift? A. No, sir.

Q. How do you know that?

A. Because we would have drifted up on the top of the shore.

Q. Did you do anything to tell as to whether or not she was drifting? A. Yes, sir.

Q. What was it? A. Put the lead over.

Q. Who, if anyone, assisted you in doing that?

A. Mr. Hemming.

Q. The older Mr. Hemming?

A. The older Mr. Hemming.

Q. What did you find when you put the lead over?

A. She was not dragging.

Cross-examination.

Mr. HENGSTLER.—Q. That is after the collision? A. Yes, sir.

Q. You were in your bunk, were you not, Mr. Olson, just before the collision? A. Yes, sir.

Q. What time did you retire? A. 9 o'clock.

Q. Had you been asleep after 9 o'clock?

A. I was laying reading in the bunk; just shortly before the collision I was going to sleep, I fell asleep.

Q. How long before the collision did you go to sleep?

A. I could not exactly—about half an hour.

Q. Where are your sleeping quarters—way in the stern of the vessel? A. In the stern.

(Testimony of Olaf Olson.)

Q. How large is that port through which you can see in your bunk?

A. A fellow can squeeze through, the average port.

Q. Is there a glass cover over the port that you can open and shut? A. Yes, sir.

Q. Was that open that night?

A. No, sir, that was closed.

Q. You say you heard the bell of the "Fullerton" ringing that night? A. Yes, sir.

Q. From what time on did you hear the bell ringing?

A. Well, the last time I was laying and reading in the bunk. [44] The fog was setting in, it was foggy and the next minute it was clear; you could see the lights on the shore.

Q. Did you see the lights from the shore?

A. Once in a while.

Q. From your bunk?

A. No, sir, I could not see from the bunk.

Q. From 9 o'clock on you heard the bell on the "Fullerton," did you?

A. Once in a while. Once in a while foggy and once in a while clear.

Q. Did you watch out to see whether it was foggy or whether it was clear?

A. I could hear that with the fog whistle.

Q. What fog whistles did you hear?

A. Goat Island.

Q. What island? A. Goat.

Q. You heard the Goat Island fog whistle from where you were? A. Yes, sir.

(Testimony of Olaf Olson.)

Q. Did you hear any bells from shore?

A. On the other steamers.

Q. Did you hear any of the fog-bells that are along the shore on the slips for the steamers?

A. No, sir.

Q. You did not hear any of them? A. No, sir.

Q. Now, you are sure that the "Fullerton" did not drift after the collision? A. No, sir.

Q. I will read to you what the captain of the "Fullerton" testified to in that regard and I want to ask you whether he is correct, or whether you are correct. If the captain testified that she drifted—if the captain of the "Fullerton" testified that she drifted south afterwards and gave reasons for it he is mistaken, is he?

The COURT.—That is an argument with the witness.

Mr. HENGSTLER.—I am satisfied.

Q. You were the day watchman, were you?

A. The day watchman.

Q. You were supposed to look out for vessels approaching? A. Yes, sir.

Q. In the daytime? A. Yes, sir.

Q. Never in the night-time?

A. No, sir, except when I chose. [45]

Q. You are blind in one eye, are you, Mr. Olson?

A. Yes, sir.

Q. You were blind at that time in that eye?

A. I was.

Redirect Examination.

Mr. CAMPBELL.—Q. You can see an approach-

(Testimony of Olaf Olson.)

ing steamboat, can't you? A. Yes, sir.

Q. Was Mr. Hemming's father aboard that night, Mr. Olson? A. Yes, sir.

Q. Do you know whether or not he went to bed prior to the collision?

A. I could not tell that.

Q. Did you know where the southern end of the forbidden anchorage was?

A. 16th street dock; it extended from 16th street to Oakland somewheres.

Q. Do you know whether or not the "Fullerton" when she was lying at anchor at an ebb tide would be in the forbidden anchorage? A. No, sir.

Q. Would she, or would she not?

A. She would not according to Captain Grant.

Mr. HENGSTLER.—Q. That is all you know about it, that Captain Grant said so?

A. He was my boss in the daytime.

[**Testimony of Alexander G. McAdie, for Claimant.**]

ALEXANDER G. McADIE, called for the claimant, sworn.

Mr. CAMPBELL.—Q. Mr. McAdie, you are in charge of the weather bureau in San Francisco, of the Agriculture Department? A. Yes, sir.

Q. Have you with you the official records of the weather bureau for the months of November and December, 1909? A. Yes, sir.

Q. Is that an official record of your office?

A. That is an official record.

Q. I will ask you to turn to the date of November 13th, 1909, and read me the average wind velocity for

(Testimony of Alexander G. McAdie.)

the succeeding days up to and including December the 13th, 1909. [46] A. November 13th?

Q. From November 13th to December 13th?

A. November 13th, 1909, the average hourly velocity of the wind, nine miles and .8.

Q. Per hour?

A. Of the 24 hours; that is the average of the 24 hours.

The COURT.—Q. How is that average reached?

A. The velocity is recorded for every minute of the 24 hours continuous; then at the end of each hour the total number of miles that the wind has blown is added up; then the mean of the 24 hours is taken as the average daily.

The COURT.—Why would this be material?

Mr. CAMPBELL.—The witness has testified there was a prevailing southeast gale immediately after the collision which caused this vessel to drift down to the forbidden anchorage.

The COURT.—It is not necessary to go back as far as that. He says three or four days from this collision, but I think if you take it from December the first on it will be as far back as is necessary to show the average velocity of the wind.

Mr. HENGSTLER.—It would not be any different as long as the vessel drifted; she may have drifted in a day or two.

Mr. CAMPBELL.—We will show she would not drift in an ordinary wind.

The COURT.—The question was if the average would be material.

(Testimony of Alexander G. McAdie.)

Mr. CAMPBELL.—We will take the maximum with the day for the average.

The COURT.—Don't go further than the first; this happened on the 13th.

Mr. CAMPBELL.—Q. Will you give us the average daily velocities and the maximum of the 24 hours?

A. December the 1st, 1909, the average hourly velocity, 10 miles and .9. Do you wish its direction?

The COURT.—No, that is counsel simply asked for the average and maximum. [47]

A. (Contg.) December 2d, average hourly velocity 6.8, maximum 16 miles. December 3d, 5.2, maximum 13.

Mr. CAMPBELL.—Q. If you will just give us the hour of those maximum.

A. The time of the maximum was 12.18 P. M., December 3d.

Q. And the direction of the wind?

A. Northeast. December 4th, average 13.6, maximum 33, direction south, time 9:36 P. M. December 5th, average 5.7; maximum 15; direction northwest; time 11:56 A. M. December 6th, average 9.8; maximum 22; direction southeast; time 7.30 P. M. December 7th, average 8.7; maximum 20; direction southeast; 2:15 A. M. December 8th, average 13.2; maximum 33; direction southwest; time 10:37 A. M. December 9th, average 7.4; maximum 19; direction south; time 12:13 A. M. December 10th, average 3 miles; maximum 7; direction south; time 1:43 A. M. December 11th, average 3.9; maximum 8; direction

(Testimony of Alexander G. McAdie.)

east; time 12:35. December 12th, average 3.3; maximum, 9; direction northwest; time 3:01 P. M. December 13th, average 3.8; maximum 11; direction west; time 2:08 P. M. As I understand, that was the last date I was asked to give.

Q. What was the direction and the velocity between 11 and 12 P. M. on the 13th?

A. Between 11 and 12 P. M. on December 13th, 2 miles; from the north.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. FOULDS.—Q. What was the velocity during those two hours on the night before; during the same two hours the night before?

A. You mean December 12th?

Q. Yes. A. Between 11 and 12?

Q. Yes. A. 3 miles, northwest.

[**Testimony of R. B. Hemming, Sr., for Claimant.**]

R. B. HEMMING, called for the claimant, sworn.

Mr. CAMPBELL.—Q. How old are you, Mr. Hemming? [48] A. About 61.

Q. Have you ever been to sea in your life?

A. Yes, sir.

Q. How many years?

A. Deep water about 12 years.

Q. And coastwise?

A. Pretty nearly all the remainder of the time with the exception of the few years I was ashore.

Q. How many years, all told, have you followed the sea?

(Testimony of R. B. Hemming, Sr.)

A. I have retired after a period that may be 35 or 38 years on the water.

Q. Were you on board the "Fullerton" the night of the collision with the "Transit"? A. Yes, sir.

Q. How did you happen to be there?

A. Well, I went aboard to talk over some family matters with my son. We had seen his mother and sister that day, but they monopolized the conversation. Then we had a launch, or he had a launch that he had been experimenting on for years, and I went to explain to him and ask him about carrying out some of his theories.

Q. How often did you see your son at that time?

A. I suppose that winter I saw him—I had maybe seen him four or five or six times during the winter.

Q. When you went aboard the "Fullerton" did you make any observation as to where she was anchored with respect to land bearings?

A. That is about the first thing I did; yes.

Q. How did you do that?

A. Well, I put a lead pencil on the compass to see what the bearing was.

Q. What bearing did you have of her?

A. From Hunter's Point and a little to the left and a little northward where that signal is on Goat Island. That would be about her north and south range.

Q. Did you know at that time what was the southern line of the forbidden anchorage?

A. Approximately; yes.

Q. Do you know whether or not she was anchored

(Testimony of R. B. Hemming, Sr.)

in such a position that she could swing into the forbidden anchorage?

A. She could not; she was a little to the south of 16th street wharf; that would cross the other course about right angles. [49]

Q. Step down to the chart here and indicate as to where in your judgment she was anchored.

A. Judging the line between here and here and about straight out from here crossing almost at right angles.

Q. Take a lead pencil and mark with the letter K.

A. Yes, sir (marking).

Q. Were you awake at the time of the collision?

A. Shortly before.

Q. Were you awake at the time of the collision?

A. Yes, sir.

Q. Where were you at the time of the collision?

A. At the time of the collision I was in my son's stateroom.

Q. On which side of the vessel was that?

A. Starboard.

Q. Which part of the vessel?

A. After starboard.

Q. What time had you gone into the stateroom?

A. About half-past 9.

Q. What did you do—what did you go in there for?

A. I went in there to turn in. It threatened foggy, that it might come in foggy, and I went below to take off my coat and vest. There was an electric light there and I fixed it so that I could read. I left my

(Testimony of R. B. Hemming, Sr.)

pants on and fixed my watch where I could see it.

Q. Did you go to sleep before the collision?

A. I doze off.

Q. What, if anything, awakened you?

A. I suppose this change in the sound. When I went to sleep I could hear the distant fog whistles, it seemed to me like Lime Point was blowing; then in the distance I could hear steamers' fog whistles. The general noise you hear when you drop off to sleep in such condition.

Q. About what time do you think that was?

A. When I went to sleep?

Q. Yes.

A. That is hard to say; I was kind of dozing. There was a kind of click. I remember dozing off with the book in my hand. [50]

Q. How long before the collision did you wake up from this click you speak of?

A. I woke up before the collision maybe five or seven minutes; something like that.

Q. Could you hear any bells or whistles?

A. I could hear the fog whistle coming closer and closer to us.

Q. Did you recognize the whistle?

A. I think I recognized it.

Q. What did you think it was?

A. I thought it was the "Transit's" whistle.

Q. Did you hear any bells ringing at that time?

A. Yes, sir.

Q. What bells? A. The "Fullerton's."

Q. Where was the bell on the "Fullerton" located?

(Testimony of R. B. Hemming, Sr.)

A. The ship's bell was forward on the fore mast.

Q. How was the "Fullerton's" bell ringing?

A. Quick raps; the fog whistle was about 15 raps to five seconds.

Q. Did you see the "Transit" before the collision?

A. No, sir.

Q. Did you see her lights before the collision?

A. No, sir; I did not look out the port hole.

Q. Until how long before the collision did the fog-bell of the "Fullerton" continue ringing?

A. The "Fullerton" seemed to be answering the blast of the steamer; I could not tell.

Q. What do you mean by that?

A. Well, if you are ringing a fog-bell and you hear a steamer close by every time she whistles you pull the bell, you kind of answer to make sure to satisfy her and yourself that she hears it so that she will go clear.

Q. Do you know whether or not, Mr. Hemming, the "Fullerton" dragged her anchor after the collision?

A. She did not drag it.

Q. Did you make any test to see whether she did or not? A. My son told me to put the line over.

Q. What did you do?

A. I put it over away from the ship. Mr. Olson gave me a sinker and I took that and knew from my experience in fishing that I could tell from that line whether she [51] was dragging.

Q. What did you find?

A. She was not dragging.

70 *Mission Transportation & Refining Company*

(Testimony of R. B. Hemming, Sr.)

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Hemming, when did you take the bearings that you testified you took?

A. About half-past four.

Q. On the same day? A. Yes, sir.

Q. What day was that?

A. That was the 13th; the day that this controversy is about.

Q. The 13th of December? A. Yes, sir.

Q. About half-past four? A. About.

Q. What time did you go on board the “Fullerton”? A. Just a few minutes before that time.

Q. Why did you take her bearings?

A. Second nature.

Q. Did you at that time think that there would be a controversy about the bearings? A. No, sir.

Q. Did the captain ever ask you to take the bearings of the vessel? A. No, sir.

Q. It was not your business to do so, was it?

A. Yes, sir, it was my business in a way. This is east, that is north, that is south and that is west (pointing). I always locate myself wherever I am; I guess it is my early training.

Q. You say you heard the bell of the “Fullerton”?

A. Yes, sir.

Q. From what time on was the bell rung?

A. I don't know when it commenced to ring.

Q. You don't know when you first heard it, do you?

A. It might have been eight minutes; it might have been five minutes before the collision that I first remember.

(Testimony of R. B. Hemming, Sr.)

Q. That was the first time that you heard the bell ring at all? A. That I remember.

Q. Of that whole ringing?

A. I don't think I heard it before.

Q. You didn't hear it while you were awake and reading?

A. No, sir, there was no fog then close by; there was no sound [52] around that would convince me there was any fog close by. I could hear fog whistles off in the distance.

Q. You say you have had experience at sea?

A. Yes, sir.

Q. Do you know how the bells should be rung in a fog, do you?

A. I know how they used to be in my time, yes.

Q. What is the way a fog-bell should be rung?

A. At least at one minute intervals at about five seconds; and ring the bell oftener if necessary.

Q. Is it rung by striking the clapper on both sides of the bell rapidly?

A. Some men do that, but generally it is just hit from one side; the same as you strike 8-6-4 (illustrating), you hit it one side.

Q. Is it not your experience that the universal way of striking the fog-bell is by hitting it on both sides?

A. I never saw it. It was never done that way.

Q. What was the diameter of the fog-bell, do you know, on the "Fullerton"?

A. It might be 10; it might be 18. I think it is larger than 18. I never investigated that closely.

Q. You heard it strike before the collision?

(Testimony of R. B. Hemming, Sr.)

A. Yes, sir.

Q. From the way it was struck can you tell now whether it was struck from one side of the bell or from both sides?

A. It sounded to me like it was struck from one side. There is a distinct sound if you strike it from one side (illustrating).

Q. The sounds would be more rapid if it was struck on both sides than if it was struck on the one side?

A. It depends on who was handling it, the length of the lanyard and the man who you have. A man that is on the end of a 18-inch lanyard, I don't see how he could very well make clear distinct sounds from both sides.

Q. The nearer you are to the bell and the shorter the rope the better the sound is, is it not?

A. Not if the bell is in this direction; you can strike it 6-8-10-15 if you hit it like you hook a button. [53]

Q. You admit if you hit it from one side there is more of an interval?

A. Not necessarily. Here is your bell and lanyard (indicating); you could hit that back 12 or 20 inches almost as clear, or as clear as you could with a six-inch lanyard.

Mr. HENGSTLER.—That is all.

[Testimony of Frank Elwood Ferris, for Claimant.]

FRANK ELWOOD FERRIS, called for the claimant, sworn.

Mr. CAMPBELL.—Q. What is your business?

A. Marine superintendent of the Union Oil Company.

Q. Do you hold a ship-master's license?

A. Yes, sir.

Q. Have you been in command of ships at sea?

A. Yes, sir.

Q. What vessels?

A. I was in command about seven years on the China coast from the time I was 21 years of age; then I came over here and I have been in command of the "Lansing" and "Argyll" on this coast.

Q. What character of ships are they?

A. They are oil carriers; the "Lansing" is about 6,000 tons.

Q. Were you marine superintendent of the Union Oil Company at the time of the collision between the "Fullerton" and the "Transit"? A. Yes, sir.

Q. How long had you been such?

A. I had been about 18 months in the employ at that time.

Q. Do you remember the anchoring of the "Fullerton" in the month of September, 1909?

A. Yes, sir.

Q. Who ordered her anchored? A. I did.

Q. Where did you direct that she be anchored?

A. Off the Union Iron Works well clear of the fairway.

74 *Mission Transportation & Refining Company*

(Testimony of Frank Elwood Ferris.)

Q. Where did the most southern edge of the fairway extend at that time?

A. From 16th street on the San Francisco side to Alameda mole.

Q. Did you ever see the "Fullerton" after she was anchored and up to the time of the collision?

A. I will not say every day, [54] but every other day. My duties take me to the Union Iron Works when we have ships in there for repairs, and which is nearly all the time, so that is the reason I wanted the "Fullerton" in a position and right off there so I could see how things were on the vessel from time to time.

Q. How many ships did the Union Oil Company operate?

A. With the ones we purchased we have about 21.

Q. You say you have ships in repair most of the time at the Union Iron Works?

A. It is very seldom that we do not have one vessel there.

Q. Where was the "Fullerton" anchored at the time, at the day previous to the collision, if you know? Locate it on the chart according to the best of your judgment.

A. Yes, sir.

Q. Mark it with a L.

A. Yes, sir (marking).

Mr. HENGSTLER.—Q. At the point marked L?

A. Yes, sir; practically that. I never really took any bearings. She was just directly off from the Union Iron Works.

Mr. CAMPBELL.—Q. Will you state whether or

(Testimony of Frank Elwood Ferris.)

not in that position she could swing into the forbidden anchorage? A. No, sir; she could not.

Q. Was any notice ever given by the State Board of Harbor Commissioners to change her anchorage up to December 13th, 1909?

A. Not up to December 13th.

Q. Where was she taken after the collision?

A. After the collision she was taken to the Union Iron Works for repairs. It was during that time, if I remember correctly, that we received instructions on the new forbidden anchorage.

Q. What size vessel is the "Fullerton"?

A. She is practically 1,500 tons gross.

Q. What length?

A. I am not quite sure of that; I think somewhere around 230 feet.

Q. What are the requirements as to the weight of anchors for a [55] vessel of the size of the "Fullerton"?

A. I could not answer that offhand, but I think in the neighborhood of 4,000 pounds.

Q. What size anchors, if any, does the "Fullerton" carry?

A. The "Fullerton" port anchor is something over 5,000 pounds and the starboard anchor is about 4,500 pounds.

Q. How do those anchors compare with the usual size of anchors on vessels the type and size of vessel of the "Fullerton"?

A. Her anchors are over size for that size of vessel.

Q. Any reason for having them so?

(Testimony of Frank Elwood Ferris.)

A. We have most anchors over sized on account of loading in a seaway in Port Harford. We load in a seaway and we need the anchors.

Q. What do you mean by a seaway in Port Harford?

A. In Port Harford you are right in the open sea; you are open right in the Pacific; there is simply a little breakwater.

Q. That is in the southern part of California?

A. Yes, sir, about 200 miles from here. The sea comes right in; it is simply the force of the Pacific coming right in, and the sea coming in is when we need our anchors.

Q. Do you ever load at that port without placing your anchors? A. Never.

Q. Where had the "Fullerton" been plying prior to the collision?

A. To the Islands and up and down the coast from Seattle to San Diego.

Q. Where was she loading for?

A. Port Harford.

Q. I will ask you to locate on the chart the sugar refinery. A. It is here (pointing).

Q. Mark it with the letter "S."

A. Yes, sir. (Marking.)

Q. I will ask you to locate upon the chart the Risdon Iron Works. A. Yes, sir. (Pointing.)

Q. Mark it with a capital "R."

A. Yes, sir. (Marking.)

Q. Locate on the chart the Union Iron Works and mark it with a "U."

(Testimony of Frank Elwood Ferris.)

A. Yes, sir, about here. (Marking.) [56]

Q. Captain, I will ask you this question: With the tide flowing in the wharves of San Francisco at a rate of six miles an hour, could a man in a rowboat row from a point which was northeast of the 16th street dock, could he by keeping his boat headed on a southwest course reach the 16th street dock?

A. Unless he had a very strong boat's crew he could not.

Q. What would be the effect of the tide upon that boat?

A. Well, unless he had a crew of say six men; even then with six oars he could go with the tide and then pull in, and he would land at some point according to the speed his boat had from his position,—that is, allowing for the effect of the tide. He simply could not go against the tide; he would have to pull and go with it and cross it.

Q. Is it possible for a man to row against a six-knot tide on a straight line?

A. No, sir, he could not; he would have to go with it.

Q. Captain, in your judgment, based upon your experience, I will ask you if the "Fullerton" with her port anchor down and 60 fathoms of cable could have drifted from the position where she was anchored into the fairway when the wind was blowing from the southwest at a maximum velocity of 33 miles per hour?

A. Well, I could answer that in another way.

Q. Would she?

(Testimony of Frank Elwood Ferris.)

A. Under some circumstances she might. It all depends upon the holding ground you are in. Now, 60 fathoms in some anchor grounds would not hold the vessel. We had considerable trouble after the collision in getting out the "Fullerton's" anchor. He had a very hard job; it seemed to be buried.

Q. What was the character of the holding ground?

A. I do not know exactly but I think it is soft mud.

Q. Were there any other vessels anchored there at the time of the collision?

A. Yes, sir; the "Lansing" was about 150 feet from the "Fullerton" and the "Ventura" was anchored there. [57] There were two or three vessels anchored there as well as the "Lansing" and "Ventura."

Q. What was the popular anchorage for vessels entering at that time in San Francisco bay?

A. Until the change, just off the Union Iron Works. That is where we laid all our vessels up.

Mr. CAMPBELL—That is all.

Mr. CAMPBELL.—That is my case, with the exception of the captain's deposition, which may go in. I will offer it in evidence.

Mr. HENGSTLER.—The captain's deposition was taken by you. I suppose it is in evidence.

Mr. CAMPBELL.—I just said I will offer it in evidence.

The COURT.—Have you anything further?

Mr. FOULDS.—We will offer in evidence this chart as Libelant's Exhibit No. 1.

(The chart is marked "Libelant's Exhibit No. 1.")

**[Testimony of W. H. Higginson, for Libelant
(in Rebuttal.)]**

W. H. HIGGINSON, called for the libelant in rebuttal, sworn.

Mr. FOULDS.—Q. Captain, does the steamer “Transit” have steerage-way under less than half speed?

A. Less than half speed she would lose her helm very slightly, but not to control her.

Q. Answer this question, Captain. In guiding your course across the bay in the fog that night what sound did you use to give you your bearings?

A. Only the compass.

Q. Did you rely upon anything else?

A. Nothing else. There is no sound to be used in a dense fog, only the compass.

Q. You had the lookouts of course on the bow?

A. Yes, sir.

Q. And they were listening? A. Yes, sir.

Q. And were you governed by the sound?

A. Governed by any sound I could hear; yes.

[58]

Q. You testified, didn't you, that you knew where the “Fullerton” was the day before?

A. Yes, sir; I knew the bearings from the slip.

Q. Counsel for the claimant in this case asked you whether after the hearing of the bell of the slip you felt any apprehension when you failed to hear the bell of the “Fullerton.”

Mr. CAMPBELL.—Are you going to try your case over again?

(Testimony of W. H. Higginson.)

Mr. FOULDS.—I thought there was a little misunderstanding.

Mr. CAMPBELL.—I think the record is clear.

The COURT.—I think so.

A. Shall I answer?

Mr. FOULDS.—Q. Yes.

A. Not hearing the bell of the "Fullerton," I thought my course was right.

The COURT.—I think the record is clear enough.

Cross-examination.

Mr. CAMPBELL.—Q. What is the lowest speed of the "Transit" under which she will maintain speedway?

A. I think she will maintain speedway steering her at half speed.

Q. Give me the speed in miles.

A. Seven miles.

Q. What is the regular speed?

A. Full speed fair weather she will go 11 knots.

Q. When you are speaking of her all the time you are speaking of knots? A. Yes, sir.

Q. You are always speaking of knots?

A. Yes, sir.

Q. You mean to say that the slowest speed that you can keep steerage-way is about seven knots?

A. The lowest speed is about seven knots.

Q. I am asking you about the lowest speed you can keep steerage-way?

A. I have never found out going on the reversed bell.

Q. As a matter of fact, can't you maintain

(Testimony of W. H. Higginson.)

steerage-way at three knots? A. No, sir.

Q. Why not? A. On account of one rudder.

[59]

Q. What does she need, more rudders?

A. One rudder is sufficient. I have been running over 35 years at that average speed.

Q. Don't you think she would maintain steerage-way at four knots?

A. No, sir; but as I said before, I do not know the exact amount of knots. I know when she is going slow and we do not keep a log as you do in deep water ships; we run there under slow or fast bell.

Q. You cannot tell me in knots how slow that vessel can go and still maintain steerage-way?

A. No, sir.

Q. I want you to locate for me on this chart the dock from where you depart on the Oakland side.

A. Right there (pointing). We start from this dock.

Q. I thought you told me the other day you departed from the Long Wharf. A. No, sir.

Q. Mark it with a capital "O."

A. Yes, sir. (Marking.)

Q. Where would a southwest by south course bring you up on the San Francisco shore?

A. It would bring me up to my slip on a flood tide.

Q. If there was no tide at all where would a southwest course bring you on the San Francisco shore?

A. About Mission Rock.

Q. Where would a southwest half south bring you?

A. Without any tide?

82 *Mission Transportation & Refining Company*

(Testimony of W. H. Higginson.)

Q. Yes.

A. It would bring me right in between Mission Rock to about there (pointing); between Mission Rock and Hunter's Point.

Q. When the tide was running three knots an hour where would a southwest by south course bring you?

A. In clear weather we make allowances.

Q. Answer my question.

Mr. HENGSTLER.—He is.

A. You are bringing me down to a very fine line on a proposition with a big heavy boat. We figure a great deal on the strength of the tide when we run. If the tide is running very strong we [60] keep up a little here.

Q. Then the allowances you make would depend upon the character of tide? A. Yes, sir.

Q. When you run in the fog you have that uncertainty?

A. In fog you cannot make very fine calculations. It is according to how the tide is.

Mr. CAMPBELL.—That is all.

Mr. CAMPBELL.—I take it, it is not necessary to read that deposition.

The COURT.—No.

(Testimony closed.)

[Endorsed]: Filed May 20, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [61]

**[Certificate of Clerk U. S. District Court to
Supplemental Apostles on Appeal.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of Cali-

fornia, do hereby certify the foregoing and hereunto annexed sixty-one pages, numbered from 1 to 61, inclusive, contain a full, true and correct Transcript of the Testimony of various witnesses taken at the trial, and not included in the original transcript on appeal, in the cause entitled Southern Pacific Company, a corporation vs. Barkentine "Fullerton," No. 15,070, as the same now appears on file and of record in the said District Court, Division No. 1, and which is now made up in accordance with the instructions of Messrs. Ira A. Campbell, McCutchen, Olney and Willard, proctors for appellants herein.

I further certify that the costs of preparing and certifying the foregoing Transcript of Testimony is the sum of Thirty-six Dollars and Seventy Cents (\$36.70), and that the same has been paid to me by proctors for appellants herein.

In witness whereof, I have hereunto set my hand and the seal of said District Court this 31st day of May, A. D. 1913.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy. [62]

[Endorsed]: No. 2262. United States Circuit Court of Appeals for the Ninth Circuit. Mission Transportation and Refining Company, a Corporation, Claimant of the Barkentine "Fullerton," etc., Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Supplemental Apostles on Appeal. Additional Testimony. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed May 31, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2262

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MISSION TRANSPORTATION AND REFIN-
ING COMPANY (a corporation), claimant of
the Barkentine "Fullerton", etc.,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLANT.

Statement of the Case.

On the 13th day of December, 1909, at about 11:30 p. m., in a dense fog, the car ferry "Transit", operated by respondent (libelant below) and cross-appellant, collided with the barkentine "Fullerton", belonging to appellant (cross-libelant below). At the time of the collision the "Fullerton" was anchored within a permitted anchorage zone, south of Mission Bay slip in San Francisco harbor, and the "Transit" was on one

of her regular trips, with a load of freight cars, from Oakland Mole to Mission Bay.

The "Fullerton" had been anchored in her then position during the month of September, preceding, and had there remained up to the time of the collision. The "Transit" was one of the Southern Pacific Company's regular freight car ferries traversing San Francisco Bay between Oakland and San Francisco, and had passed the "Fullerton" on three or four, and sometimes more, trips per day during the period of her anchorage. The "Fullerton" was displaying the regulation anchor light, and was at all times maintaining a proper lookout, who, during the prevalence of the fog, diligently sounded the fog bell as required by law of anchored vessels.

Prior to the collision, and during the same evening and night, the "Transit" had left the Oakland side at 5:43 p. m. and arrived at the Mission Bay slip at 6:27. She left the slip again at 7:14, arriving at Oakland Mole at 7:52, and departed again for Mission Bay at 8:01, reaching the latter at 8:40 p. m. She returned to Oakland at 9:30, arriving there at 10:24 and left again at 10:53, and on the return trip at about 11:25 p. m. ran into the "Fullerton". No fog prevailed during the earlier trips of the evening, but set in shortly after the "Transit" last departed from Oakland. A fog bell was maintained on the Mission Bay slip, and the master of the "Transit" claims to have heard this 22 or 23 minutes after leaving Oakland. He denies, however, having heard the "Fullerton's" fog bell, and

asserts that his first intimation of being in proximity to the "Fullerton" was the report of her light by the lookout, which, upon his looking up from the compass, was immediately seen by him bearing on the "Transit's" port bow, over the jackstaff located at the forward port corner of the "Transit's" main deck. The master during the entire trip was inside of the pilot house, himself steering the "Transit", and watching her compass, and upon looking up and seeing the "Fullerton's" light, he rang the jingle bell to go full speed ahead on her engines, and put the helm hard aport in an effort to cross the "Fullerton's" bow. He then looked up again, and seeing there was no chance to avoid the "Fullerton", and, at the same time, hearing her first officer, who was also in the pilot house, say "stop her, Captain," rang the stop bell, and "landed right across her ('Fullerton's') bow".

The "Transit" was making about seven knots at the time the light of the "Fullerton" came into view, and though lookouts were being maintained forward on the main deck below, there was no navigating officer outside of the pilot house.

A libel was thereafter filed by respondent against the "Fullerton", and a cross-libel, in turn, filed by appellant against the Southern Pacific Company. The cause came on for trial on January 17, 1913, before the Honorable Frank S. Dietrich, sitting as judge of the United States District Court for the Northern District of California. Upon the conclusion of the trial, Judge Dietrich rendered his decision, holding that

the collision was due to an inevitable accident, and, if not that, to an inscrutable fault. Thereafter this appeal and cross-appeal were prosecuted.

Specifications of Error.

Errors have been assigned, in the Apostles on Appeal, to the decree of the District Court dismissing the cross-libel of appellant.

The assignments of error will be discussed, for convenience, under the following specifications:

I.

The court erred in not holding that the "Transit" had not overcome the presumption of fault resting against her as the moving vessel.

II.

The court erred in not holding that the "Transit" was at fault for proceeding in the fog at an excessive speed.

III.

The court erred in not holding that the "Transit" was at fault for not stopping her engines when first hearing forward of her beam the fog bell of the "Fullerton", and then navigating with caution, as required by the second paragraph of Rule 16 of the Inland Rules of Navigation.

IV.

The court erred in not holding that the "Transit" was negligently navigated in that she did not stop and reverse her engine on first seeing the "Fullerton's" light.

V.

The court erred in not holding that the "Transit" was negligently navigated in that

(a) Her master was in the pilot house, engaged in steering her, instead of devoting his exclusive attention to the duties of master in her navigation; and

(b) No navigating officer was stationed on the bridge outside of the pilot-house.

VI.

The court erred in holding that the collision was due to inevitable accident or inscrutable fault.

Argument.

I.

PRESUMPTION OF FAULT AGAINST THE "TRANSIT".

The "Fullerton" was at anchor, as she had been since the preceding September. Supp. Apostles, pp. 6, 51.) She was anchored by the tug "Restless", operated by the Shipowners & Merchants Tugboat Company, south of the southernmost line of the forbidden anchorage zone, extending from 16th street wharf

in San Francisco to the Alameda Mole. (Supp. Apostles, pp. 51-52; Apostles, pp. 56-57, 140-141.) The charts introduced as exhibits show a present forbidden anchorage south of the then forbidden zone, but, to avoid confusion in the use of the charts, it was stipulated that the southernmost boundaries of the forbidden anchorage at the time of the collision was the line from the end of the 16th street wharf to the Southern Pacific Mole, being the line marked "A-B" on claimant's exhibit 1. (Apostles, pp. 44-45.) She was thus, at the time of the collision, properly anchored in waters specially set aside for anchorage purposes. Her presence must have been known to the master of the "Transit" from the date of her anchorage, though he would only frankly admit knowledge of it for about three days previous to the collision. (Apostles, pp. 59-61, 70; Supp. Apostles, p. 79.) Be that as it may, there is no evidence of his having made any complaint that she was within the forbidden anchorage, and the master of the "Transit" confessed to knowledge of her position, not from the fact of having necessarily passed her *four* times on the day and night of the collision, but admittedly from similar passing of her on three or four trips a day for at least the two preceding days. (Apostles, pp. 59-61, 70, 81; Supp. Apostles, p. 79.)

Certain it is, then, that the "Transit" collided with a vessel anchored in permitted waters, the position of which was known to the former. Under these circumstances, *the burden of proof was upon the "Transit" to exonerate herself from liability.*

This rule is so well established in the law of collisions that it requires no extended citation of authority. It was stated as follows by the Supreme Court of the United States in

The Virginia Ehrman, 97 U. S. 309; 24 L. ed. 890, 892:

“Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame, by showing that it was not in her power to prevent the collision by adopting any practicable precautions.”

The rule not only imposed upon the “Transit” the burden of exonerating herself, but raised a presumption of fault against her.

The Oregon, 158 U. S. 186; 39 L. ed. 943.

In that case the steamship “Oregon” ran down, on a clear night, the bark “Clan Mackenzie”, anchored on the west shore of the Columbia River. In holding the “Oregon” solely at fault, Mr. Justice Brown, writing the opinion, stated the principles of law governing collisions between moving and anchored vessels, as follows:

“The circumstances above detailed raise a presumption of fault on the part of the Oregon, and the burden of proof is upon her to exonerate herself from liability. * * * As we had occasion to remark in *Alexandre v. Macham*, 147 U. S. 85 (37:90), where one vessel clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the man-

agement of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. *This principle is peculiarly applicable to the case of a vessel at anchor, since there is not only a presumption in her favor, by the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter.*" (Italics ours.)

The Clara Clarita, 23 Wall. 1, 23 L. ed. 146;

Rich v. Hamburg-American Packet Co., 117 Fed. 751;

The Lucille, 169 Fed. 719.

This court applied the rule in

The Europe, 190 Fed. 475,

affirming Judge Wolverton, who stated the rule and its reasons in the following language:

"It is a rule that a moving vessel must keep out of the way of one at anchor. This because the one at anchor is practically helpless, and is usually so conditioned as to be unable to relieve herself readily in stress of emergency. The rule is applied with great strictness, the vessel at anchor being in a proper place. In such case *the presumption of fault lies against the vessel in motion.*" (Italics ours.) 175 Fed. 596.

A case peculiarly in point because of its being a collision in a fog between the ferry "D. S. Gregory" and the steamship "Talisman", anchored near the course of the ferry, of which fact those in charge of the navigation of the ferry had knowledge, was that of

The D. S. Gregory, Fed. Cas. 4102.

In holding the ferry solely at fault, Circuit Judge Nelson said:

“It was the duty of the D. S. Gregory to take every reasonable precaution in her power to avoid the Talisman. In this, I think, she failed. She knew that the Talisman was anchored in her track the afternoon or evening before; and, as the Talisman did not change her position, down to the time of the collision, and the ferry boat was passing her every trip she was making, the ferry boat is chargeable with notice of her position, and should have been so navigated as to avoid her. Decree below affirmed.”

The same court, in

The Bedford, Fed. Cas. 1216,

held a ferry at fault for colliding with a schooner, knowledge of the anchorage of which was held by the ferry boat's officers, who had previously warned the schooner to move. The latter was also held liable for anchoring within forbidden grounds. This fact, not present in the case at bar, makes the rule none the less applicable to the “Transit”. Of the ferry's fault, Circuit Judge Nelson remarked:

“I think that the ferry boat, also, was in fault, in not avoiding the schooner, as the pilot knew her position, and that the mate had refused to change his location. I cannot but think that if greater precaution had been used, the collision need not have occurred, notwithstanding the density of the fog.”

The decision in

The Gregory, supra,

was later followed by Judge Brown, of the Southern District of New York, and, on appeal, by Judge Wallace, in the Circuit Court, in

The Rockaway, 19 Fed. 449; 25 Fed. 775.

There, a ferry boat was in collision during a snow squall with a brig anchored in usual anchorage grounds near the course of the ferry, the position of the brig being known to the ferry. In holding the ferry solely at fault, Judge Wallace said:

“As the pilot of the ferry boat had been making trips every few minutes for several hours prior to the collision, passing the brig on each trip, he had notice of her location. It cannot be doubted that under such circumstances it was incumbent upon the steamboat to exonerate herself from fault by satisfactory proof of exculpating circumstances,—some extraordinary or unusual occurrence which nautical men could not anticipate or prevent by the exercise of all reasonable precautions.”

Possessed of full knowledge of the anchorage of the “Fullerton”, the “Transit” has not only failed to exonerate herself from the presumption of fault thus imposed upon her, but the record affirmatively shows the most culpable negligence in her navigation. She was running at an excessive rate of speed in a dense fog, a speed at which she could not be stopped in less than 800 feet, though the fog was so dense the master could only see the “Fullerton” 100 feet, and a speed at which her engines could not be immediately reversed.

Upon being apprised of the proximity of the "Fullerton", the "Transit's" engines were put at full speed ahead, and then stopped the moment she was upon the "Fullerton", instead of being immediately reversed. Her master, who was controlling her navigation and giving all signals to the engine room, was busily engaged in the pilot house steering the vessel, with his eyes fixed upon the compass, instead of having his undivided attention centered upon the navigation of his vessel through the fog as he approached the wharves of San Francisco and known anchorage of vessels. Any one of the faults were sufficient to involve the "Transit", let alone the presence of all of them. To say the least, it was flagrant navigation of a large and unwieldy vessel, in the crowded and fog-ridden waters of San Francisco Bay, which merits the severest condemnation.

II.

THE "TRANSIT'S" SPEED WAS EXCESSIVE.

A. *The "Transit's" Speed Per Se Excessive.*

At the opening of the case, on direct examination, the master of the "Transit" admitted a speed in the fog that has been condemned as excessive by the Supreme Court in at least four leading cases, to say nothing of the numerous decisions of the District Court and Circuit Courts of Appeal.

He testified as follows:

“Mr. HENGSTLER:

Q. You left the Oakland slip at 10:53?

A. Yes.

Q. In the night time?

A. Yes.

Q. What was the destination of the steamer at that time?

A. Mission Bay slip, 16th Street.

Q. *How was the weather?*

A. Dense fog.

Q. Under what speed did the steamer “Transit” proceed on the trip across the bay?

A. Well, she was under a slow bell, that is, as close as we could shut her off without losing steerage-way. *I should say perhaps seven miles an hour; perhaps a little more, or perhaps a little less.* (Apostles, p. 47.) (Italics ours.)

The speed thus confessed was early held to be excessive by the Supreme Court in

The Pennsylvania, 19 Wall. 125; 22 L. ed. 148, where a collision took place upon the high seas between a steamship and a sailing vessel. If the court had been passing judgment upon the “Transit’s” speed, the opinion could not have more pertinently pointed out wherein such a speed was too high for the “Transit” in the harbor of San Francisco, under conditions where the master knew that not only moving, but anchored vessels were to be met in the fog. Of the “Pennsylvania’s” speed Mr. Justice Strong said:

“Our rules of navigation, as well as the British rules, require every steamship, when in a fog, ‘to go at a moderate speed’. What is such speed may not be precisely definable. It must depend upon

the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the requirement being to guard against danger of collisions, very plainly the speed should be reduced as the risk of meeting vessels is increased. In the case of 'The Europa,' Jenkins, Rule of the Road at Sea 52, it was said by the Privy Council: 'This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she sees danger to be possible, and if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour.' We do not think the evidence shows any necessity for such a rate of speed as the steamer maintained. It is true her master, while admitting she was going seven knots, states that he don't consider she could have been steered going slower—could not have been steered straight. And two other witnesses testify that, in their opinion, she could not have been navigated with safety and kept under command at a less rate of speed than seven miles an hour. These, however, are but expressions of opinions based upon no facts. They are of little worth. And even if it were true that such a rate was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to. * * * We think, therefore, it must be concluded that the steamer was going at an undue rate of speed, and that it was her fault that she came into a position from which she could not, or certainly did not, escape without colliding with the bark."

Later, in

The Nacoochee, 137 U. S. 330; 34 L. ed. 687, 690, the Supreme Court condemned the steamship "Nacoochee" for a collision on the high seas with a sailing vessel, where the steamer was proceeding in a fog at a rate of seven knots per hour. Of the duty resting on the steamship to moderate her speed, Mr. Justice Blatchford remarked:

"She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog."

A speed of six knots an hour was likewise held excessive by the Supreme Court in

The Martello, 153 U. S. 64; 38 L. ed. 637, 640, where the steamship "Martello", as she was leaving the port of New York, collided with a sailing vessel. In holding the "Martello" at fault, Mr. Justice Brown, writing the opinion of the court, said:

"By the finding of the Circuit Court that, at the time the horn of the barkentine was heard upon the steamer, the latter was proceeding at a speed of from five and a half to six knots an hour, we are relieved from the necessity of examining the somewhat conflicting testimony upon the question of the steamer's speed. While it is possible that a speed of six miles an hour, even in a dense fog, may not be excessive upon the open ocean and off the frequented paths of commerce, a different rule applies to a steamer just emerging from the harbor of the largest port on the Atlantic coast, and in a

neighborhood where she is likely to meet vessels approaching the harbor from at least a dozen points of the compass. Under such circumstances, and in such a fog that vessels could not be seen more than a quarter of a mile away, it is not unreasonable to require that she reduce her speed to the lowest point consistent with a good steerage way, which the court finds in this case to be three miles an hour."

If a speed of six knots was thus to be condemned as immoderate for a steamship emerging from New York harbor on to the high seas, how much less can it be justified in the case of the "Transit", crossing from Oakland to San Francisco through waters in which vessels in great number are constantly passing, and particularly in approaching the wharves of San Francisco in the vicinity of vessels known to be at anchor?

The Supreme Court, however, is not alone in condemning a speed of seven knots under such circumstances, but the reports are replete with similar rulings by the lower courts, citation of a few of which will suffice to show the general disapprobation with which such speeds in fogs have met.

The Eleanor, Fed. Cas. 4335;

The Manistee, Fed. Cas. 9028;

The Pottsville, 12 Fed. 631;

The Lepanto, 21 Fed. 651;

McCabe v. Old Dominion S. S. Co., 31 Fed. 234;

The Catalonia, 43 Fed. 396;

Pennell et al. v. U. S., 162 Fed. 64.

No evidence was introduced which would support any reason for removing the "Transit" without the operation of the rule which has been so rigidly applied to cases less deserving. Consider for a moment that the "Transit" was traveling, in a fog so dense that her officers could not see more than 150 feet, towards vessels she knew to be at anchor in the harbor, headed directly for the wharves to and from which vessels were always moving, and certainly we have a situation more pregnant with the probabilities of collision than on the open waters of the high seas, or even at the entrance to New York harbor. If the Supreme Court was right in holding seven knots to be excessive under the latter conditions, it necessarily follows that the District Court erred in its failure to condemn the "Transit" for a like speed in San Francisco harbor.

B. *The "Transit's" speed was excessive in that she could not be stopped before striking the "Fullerton" after coming in sight of her in the fog.*

Even if the admitted speed of seven knots was not *per se* excessive, the "Transit's" speed was certainly immoderate when tested by the principles upon which rest all of the decisions condemning speeds in fog. This underlying principle was succinctly stated as follows by Mr. Justice Brown in

The Chattahoochee, 173 U. S. 540; 43 L. ed. 801, 805:

"No absolute rule can be extracted from these cases. So much depends upon the density of fog

and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances. It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight provided such approaching vessel is herself going at the moderate speed required by law."

It is the same principle, stated in slightly different words, as that on which the "*Nacoochee*", *supra*, was condemned. We again quote Mr. Justice Blatchford on the rule:

"She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel, which she should see through the fog."

In that case, the colliding vessels were under way, a fact which in no way lessens the application of the rule to moving vessels in collision with those at anchor. For its violation, the S. S. "*Northern Queen*" was held at fault for colliding with the Whaleback "*Sagamore*" at anchor in a fog in St. Mary's River, Judge Hazel saying:

"It was held in *The Chattahoochee*, 173 U. S. 548; 19 Sup. Ct. 491, 43 L. ed. 801, that 'moderate speed' consists in such a rate as will enable a steamer to stop in time to avoid collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. The *Sagamore* being at

anchor, the principle enunciated in this case would require the *Northern Queen* to proceed at such a moderate rate of speed as would have prevented the collision by proper management, after the *Sagamore* came in view, unless circumstances existed which made it dangerous for her to proceed at moderate speed. *The Pennsylvania*, 19 Wall, 125; 22 L. ed. 148; *The Colorado*, 91 U. S. 692; 23 L. ed. 379; *The Batavia*, 40 Eng. Law & Eq. 19; *The Nacoochee*, 137 U. S. 330; 11 Sup. Ct. 122; 34 L. ed. 687. This rule is well settled, and, where properly applied, has been reaffirmed and followed."

The Northern Queen, 117 Fed. 906, 911.

In

The Kentucky, 148 Fed. 500,

the rule was invoked to condemn the "*Kentucky*" for colliding with the "*Exeter City*" which was stopped and engaged in discharging her pilot at the entrance to Gedney Channel, New York harbor. Though her speed was between five and seven knots, the "*Kentucky*" was held solely at fault, the court saying:

"It is admitted that she was then going at the rate of three or four knots but was probably going considerable in excess of five knots at the time. In any event, she was clearly violating the rule that steamers navigating in a fog are bound to reduce their speed to such rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such an approaching vessel is herself going at the moderate speed required by law. *The Chattahoochee*, 173 U. S. 540, 548; 19 Sup. Ct. 491; 43 L. ed. 801. As the *Exeter City* here was practically not moving, the latter part of the rule need not be considered and this proves to be a case where the implicated ves-

sel was going at such a rate that she could not bring herself to stop before striking a motionless vessel. The Kentucky was clearly in fault, and the only real question in the case is whether the Exeter City was also in fault."

The Circuit Court of Appeals for the Second Circuit, in

The Etruria, 147 Fed 216,

held the "Etruria" in violation of the rule, when she collided with a lighter lying stationary in New York harbor, Circuit Judge Wallace remarking:

"If, owing to the state of the fog, the lighters could not have been discovered by vigilant observation until the Etruria was within 750 or 1000 feet of them, it is plain that the Etruria was maintaining too great speed. The fact that in making the changes of course her wheel was put hard over, suggests that she was going at a higher speed than she asserts. However that fact may have been, her speed was excessive if it was true that she could not reverse her engines and come to a standstill before she should collide with a vessel which she ought to have seen."

This court, in

The Bailey Gatzert, 179 Fed. 44,

applied the rule to a collision with an anchored dredge in Portland harbor, Judge Morrow stating it as follows:

"The channel of the Willamette River between the Columbia River and the City of Portland carries a large commerce, and the vessels engaged in its transportation are to be expected at all points and at all hours in passing up or down the river.

It was therefore the duty of the Bailey Gatzert to have exercised the utmost caution in navigating this channel in a fog. The *Pennsylvania*, 86 U. S. 125, 133; 22 L. ed. 148. A rule applicable to such a situation was to proceed at such a rate of speed as would enable her after discovering a vessel through the fog to have stopped and reversed her engines in time to prevent a collision. The *Great Eastern*, Brown & L. 287, 291; The *Nacoochee*, 137 U. S. 330, 339, 11 Sup. Ct. 122; 34 L. ed. 687; The *Umbria*, 166 U. S. 404, 417, 17 Sup. Ct. 610, 41 L. ed. 1053; The *Belgian King*, 125 Fed. 869, 876, 60 C. C. A. 451. This she did not do, and she was therefore clearly at fault."

The foregoing authorities, to which many might be added if necessity required, show it to be a settled rule of law that a vessel must proceed at such a rate of speed in a fog as to enable her to come to a standstill before she collides with a vessel which she can see, whether the other vessel be underway or motionless. Apply the rule to the facts of the collision between the "Transit" and the "Fullerton", and the condemnation of the former must follow just as certainly as did that of the vessels in the cases from which the rule has been drawn. We take the facts showing such violation of the rule, as they were given by the master of the "Transit":

"Q. Under what speed did the steamer 'Transit' proceed on the trip across the bay?

A. Well, she was under a slow bell, that is, as close as we could shut her off without losing steerageway. I should say, perhaps, *seven miles an hour*; perhaps a little more or perhaps a little less. (Apostles, p. 476.)

* * * * *

“Q. Now, how far distant would you judge yourself to be at the time that you saw the ‘Fullerton’ light?

A. Well, the fog was so dense it could not be seen more than a couple of hundred feet anyway. I could not tell you just how far. You can’t gauge the distance in a fog; it is impossible.

Q. I am asking your best judgment.

A. Well, it might have been 200 feet, or it might not have been that much.

Q. It might not have been that far?

A. No, it might not.

Q. It might have been farther?

A. No, you could not have seen it much farther. (Apostles, p. 75.)

* * * * *

“Q. When these ferry-boats approach the slips, the ferry-boats with side wheels, they can run almost into the slip before they have to stop and back?

A. Some of them can.

Q. Is that true of your vessel?

A. No, you have to give her time.

Q. In what distance can you bring your vessel to a stop?

A. Well, from the time I slow, at about three boat lengths of it, I run her under slow bell one length, and then run her under stop-bell for a couple of hundred feet, and then I go back the whole length of the slip, and go back hard to fully stop.

Q. As you usually run across the bay, *in what distance can you bring your vessel to a stop?*

A. We do not stop the engine right at the same time. I am answering it to the best of my ability right now.

Q. I am asking you for the distance, how far?

A. Well, we will say between eight and 900 feet.

The COURT. *Do you mean in the case of an*

emergency where an attempt is made to stop as soon as possible?

MR. CAMPBELL. *Yes.*

A. Under full speed you can't stop her inside of almost three boat-lengths the way we stop.

Q. *Running at seven miles an hour in what distance can you stop her?*

A. *That is pretty near full speed, between 800 and 900 feet, the way we stop in an emergency. If you stopped the engines and tried to back her, she will not; she will jam. We have got to slow the engines first so as to give her time to recover herself; she has low pressure engines, and don't answer very well; she will jam and not back. (Apostles, pp. 77-78.)*

* * * * *

Q. Who reported the 'Fullerton's' lights?

A. The second officer, from the bow. It was his voice that I heard reporting a light on the port bow close aboard.

Q. Will you tell the Court, if you please, what you did after that, within your knowledge?

A. I was watching my compass and making my course to the best of my ability *when I heard the report from the bow 'a light on the port bow close aboard.'* I looked up instantly and *seen the light then, and I instantly shoved my helm to port and struck the jingle bell to go ahead full speed; and then I looked up again and seen there was no chance to avoid her, and at the same time I heard my first officer say 'Stop her, Captain,' and I did so; I rang the bell. At that time the light was over my jackstaff, and the first officer ducked down, he thought the jibboom of this bark was going to catch the pilot-house, catch him, and he ducked to avoid it, and we landed right across her bow, and she took our smokestack out, and we got in under her jibboom, and her jibboom carried away our box-cars. (Apostles, p. 51.)*

* * * * *

“Q. And when you saw that light you rang full speed ahead?

A. Yes, and put my helm hard-aport.

Q. You threw your helm hard-aport?

A. Yes.

Q. What did you do next?

A. Then I stopped her—immediately rang two bells.

Q. Didn't you go under the full speed ahead bell at all?

A. No time.

Q. Then you stopped her?

A. *When I seen there was no chance to avoid her, I stopped her.*

Q. But you did not back her?

A. *I had no time to back her*; I might kill the men in the engine-room if I did. I was looking out for the men in the engine-room. If I had backed and my walking-beam had caught on that, it would have killed the men in the engine-room, sure.

Q. Why is that?

A. Because the walking-beam going up and down, might have caught in the jibboom and killed them in the engine-room.

Q. *At the time you stopped you were right under her bow?*

A. Yes.

Q. Where was her bowsprit pointing?

A. She was lying right across like that (illustrating).

Q. Her bow was to the north?

A. To the north; yes.

Q. Whereabouts at the time you stopped her was her bowsprit pointing?

A. Right across the bow, right across my deck.

Q. When you stopped your engine?

A. She had not crossed then, but it was close to us.

Q. What you have alleged in your libel is true, isn't it—let me ask you to listen to this, this allega-

tion in your libel, see if it is not true; 'that 3 or 5 minutes later the lookouts last above mentioned reported a light upon the port bow of said steamer "Transit" and close aboard?'

A. Yes.

Q. 'When her helm was put hard-aport and a signal given to her engineers for full speed ahead, trying to sheer off from any vessel indicated by such light?'

A. That is right.

Q. 'But that it was then too late to avoid collision with the barkentine "Fullerton" hereinafter described, upon which said light was exhibited, the bowsprit thereof being not more than 2 or 3 feet back from the forward pilot-house of the "Transit?"'

A. I could not tell you at the time the bell struck—when this bell, *when this light was reported to me first I looked up from my compass and I saw a light right there. I could not tell how far it was off, and I rang the bell and shoved my helm hard-aport—rang the bell for full speed ahead. Then I looked down again and I seen that the light was too close aboard to avoid it, and I struck the bell to stop. My first officer said at the same time that I struck the bell to 'stop her, Captain.'*

Q. At the time you stopped her, is it not the fact that the bowsprit of the 'Fullerton' was practically over your deck?

A. Not at the time my boat was running ahead; at the same time when I struck the bell, it was not over the deck; when I struck the bell to stop it was not over the deck.

Q. How far off was it?

A. There was a dense fog; I could not tell you.

Q. You could not tell?

A. No.

Q. At the time you stopped her, where was the light on the 'Fullerton?'

A. It looked to me close over the jack-staff when I struck the bell.

Q. Over the jack-staff?

A. Yes.

Q. When you stopped her what did the flood tide do with your vessel?

A. The flood tide was carrying us on her.

Q. Which way?

A. It set her on top of the 'Fullerton.' '' (Apostles, pp. 71-73.) (*Italics ours.*)

Here, then, is the evidence by which the "Transit" is to be judged:

A steamer 335 feet long and of broad beam (Apostles, p. 76), running across the bay in one of the world's largest ports, where numerous vessels were known to be plying (Apostles, pp. 61-2), in a fog so dense that the lights of another vessel, whose anchored position was known, could not be seen more than 200 feet, and yet proceeding at a speed of seven miles per hour, under which it required, even in an emergency, between 800 and 900 feet to stop! And at that, a vessel equipped with engines which could not, by reason of their design and construction, be immediately reversed from full speed ahead.

If it be the law, of which there can be no question, that a vessel must proceed only at such a rate of speed that she can be stopped in time to avoid collision with another vessel which she can see through the fog, whether the latter be underway or motionless, *then it is certain the "Transit", going at a rate at which she could be stopped only in 800 or 900 feet, in a fog in which an-*

other vessel could be seen only 200 feet, was not proceeding at the speed required by such law. That she was in actual violation of the rule is demonstrated by the master's graphic description of the collision. The truth would seem to be that the "Transit" was traveling at such a speed that when the light of the "Fullerton" was seen through the fog, as the master stated it, "there was no chance to avoid her." (Apostles, pp. 51, 71.) Surely such navigation was not in compliance with the rule so clearly defined by highest authority.

Furthermore, the fact that her engines could not be reversed, by reason of their design and construction, in time to avoid the collision, made certain the excessiveness of her speed.

The Albert Dumois, 176 U. S. 240; 44 L. ed. 751.

Interesting light is thrown upon the contention of "slow speed" which runs through the testimony adduced by the "Transit". The master testified, as we have previously quoted him, that the fog was dense, and the "Transit" was proceeding across the bay under slow bell, "say, perhaps 7 miles an hour; perhaps more, perhaps less." Later, when cross-examined as to the distance within which he could stop the "Transit" in an emergency, from a speed of 7 miles, he remarked "that is pretty near full speed." Whether it was "slow speed," or "pretty near full speed," the record shows that no material reduction over her usual running time had been made in her speed on account of the "dense fog," which every witness admitted pre-

vailed. Take the log. (Apostles, p. 133.) On the first trip it required 44 minutes 5:43 to 6:27) to cross from Oakland to Mission Bay; the return trip took 38 minutes, from 7:14 to 7:52; the following trip from Oakland back to Mission Bay, 8:01 to 8:40, required 39 minutes; the return to Oakland was made in 54 minutes (9:30 to 10:24). On the next trip, leaving at 10:53, she was out 32 minutes at the time of the collision, granting that it occurred at 11:25. If it also be the fact that the bell on the slip, as shown by the log, was heard before the collision (Apostles, pp. 50-51, 69, 83), and if it be a further fact that the slip's bell usually could be heard 6 or 7 minutes off, it is manifest that the "Transit" was crossing the bay in about 39 minutes, or her usual running time. But to state it conservatively, if the slip's bell could usually be heard 6 or 7 minutes off, and it required 40 minutes to make the trip, the bell would not be heard until the "Transit" was some 33 or 34 minutes out from Oakland toward Mission Bay. But on the trip in which she ran into the "Fullerton", the master says that he heard the bell when he got over (from Oakland towards Mission Bay) about 22 or 23 minutes. If the latter were true, and his vessel was then sent ahead at her usual running speed so as to get to her slip in 6 or 7 minutes after hearing the bell, she would have made the trip in the unprecedented time of 30 minutes, as against 38 minutes for the fastest made during the earlier hours of the evening and night, when no fog prevailed. At 38 minutes for the trip, the bell would not be heard for 31 minutes after

leaving Oakland. On this "slow" trip it was heard in 22 or 23 minutes. If the collision occurred at 11:25, the "Transit" was then 33 minutes out from Oakland. If at that time the slip bell could be heard, and it was only six or seven minutes off, the trip could have been completed in 38 minutes. It would thus seem to follow beyond all doubt that the "Transit" was proceeding at approximately the same speed as on all other trips, fog or no fog.

And what else could the master have had in mind when, in discussing the rate of speed necessary to the maintenance of steerageway, and after fixing it at that of the "Transit's" on the trip in question, 7 knots, he said:

"I have been running over thirty-five years at that average speed." (Supp. Apostles, p. 81.)

C. Speed Excessive Even Though Necessary to Steerageway.

It doubtless will be urged that the speed was not excessive because it was as slow as the "Transit" could go and maintain steerageway. The master so testified (Apostles, p. 47). At the same time, he admitted that he could not give the speed in knots at which she could keep steerageway. Whatever the speed required for steerageway, it has been established beyond question that the "Transit" was in flagrant violation of the rule against excessive speed. The fact, if it were a fact, that she could only be steered under what would other-

wise be excessive speed, is no legitimate excuse for the violation of the rule forbidding it. If she could only proceed, in the fog, at an immoderate speed and still be kept under steerage control, it was the duty of her owner to cease running her until the fog lifted, for the inability of the "Transit" to steer at a moderate speed was no license to her owner to thus endanger the lives and property of others. It was so held by the Supreme Court in

The Pennsylvania, supra,

where Mr. Justice Strong said:

"It is true her master, while admitting she was going seven knots, states that he don't consider she could have been steered going slower—could not have been steered straight. And two other witnesses testify that, in their opinion, she could not have been navigated with safety and kept under command at a less rate of speed than seven miles an hour. These, however, are but expressions of opinion based upon no facts. They are of little worth. And even if it were true that such a rate was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. *It would rather have been her duty to lay to.*"

We respectfully submit, therefore, that the "Transit" has not overcome the presumption of fault raised against her as the moving vessel, but, on the contrary, that the record affirmatively shows her positive violation of the rule against excessive speed.

III.

THE "TRANSIT" VIOLATED THE SECOND PARAGRAPH OF RULE
16 BY FAILING TO STOP HER ENGINES ON HEARING THE
FOG BELL OF THE "FULLERTON".

The Second Paragraph of Rule 16 of the Inland Rules provides:

"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The foregoing rule is identical with Rule 16 of the International Rules, both making it obligatory to immediately stop the engines on hearing apparently forward of the beam the fog signal of another vessel whose position is not ascertained. The rule being statutory, its violation imposes upon the guilty vessel the burden of proving not only that *probably* the fault *did not* contribute to the collision, but that it *could not* have done so.

The rule was before Judge Bean, sitting in the United States District Court for the Northern District of California, in

The Beaver, 197 Fed. 866.

His opinion is so perspicuous, and contains so excellent a statement of the purpose and effect of the rule, that no further citation of authority is necessary to demonstrate the legal effect of the "Transit's"

failure to stop her engines on first hearing the fog bell of the "Fullerton."

Of the rule, Judge Bean said:

"It therefore does not leave the navigation of a vessel, when a whistle is heard apparently forward of her beam, the position of which is not ascertained, to the master's judgment, but assumes that the zone of danger of collision is reached when the whistle is heard, and forbids the ship to enter such zone except after stopping its engines to ascertain the position of the oncoming ship.

* * * * *

"The law is that where a vessel has permitted a positive breach of a statutory duty, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."

It will, of course, be contended that Rule 16 has no application to the present case because of the fog bell of the "Fullerton" not being heard. This presents the question as to the location of the bell heard on the "Transit". It is true that all of the "Transit's" witnesses testified that the "Fullerton's" fog bell was not heard before the collision. The master, first officer and some of the lookouts admitted hearing a fog bell, but assert that it was the bell established by the Southern Pacific Company on the Mission Bay slip to assist the "Transit" in locating the slip in foggy weather. On the other hand, if the testimony of the master is to be accepted, the record proves to a demonstration that the bell first heard could not have been the slip bell, but was the "Fullerton's".

The master testified that when he "got well over about 22 or 23 minutes, somewhere out there, he heard the fog bell." (Apostles, p. 69.) Assuming that the "Transit" was then running as fast as she did on her best trip that night, though the master claimed that she was under slow bell, she would have crossed the bay in 38 minutes. (Apostles, p. 133.) (Log Book. Trip from Mission Bay to Oakland, 7:14 to 7:52.) If the master heard the fog bell when she was 22 or 23 minutes out from Oakland, it is manifest that he heard it at least 15 minutes before the "Transit" would have reached the slip. Were the "Transit" actually going slower than her customary speed, the bell was heard *more than 15 minutes before* she would then have completed the trip. We are, therefore, looking at the case in its aspect most favorable to the "Transit", when we assume that the master heard the bell, wherever it was, when the "Transit" was 15 minutes off the slip.

This is most significant because later in his testimony the master stated that he *usually heard the slip fog bell 6 or 7 minutes off*.

"Q. This night that you were approaching the San Francisco shore you heard this fog bell?

A. I did, on the slip.

Q. You say it was the slip?

A. Yes.

Q. *How far off do you usually hear that fog bell?*

A. *You can hear it 6 or 7 minutes off.* (Apostles, p. 78.)

If it be true that the slip bell was usually heard 6 or 7 minutes off the slip, then it *certainly was not the slip*

bell which was heard 15 minutes off,—22 or 23 minutes after leaving Oakland mole.

That it could not have been the slip bell is shown by the following additional testimony of the master:

“Q. In what sort of box is this bell on the dock inclosed?

A. It is inclosed in the rear and open in the front, a sounding-board behind it.

Q. A sounding-board with a flare-out, isn't it?

A. Yes, a flare-out.

Q. That flare-out points toward the Oakland mole?

A. It points right out from the slip; if you are *either side of it, you can't hear it very well; if you are right in front of it you can get the sound.*

Q. That flare-out is toward the Oakland mole, isn't it?

A. It is right out from the end of the slip; it stands right up from the end of the slip.

Mr. HENGSTLER. Q. *Toward the Oakland mole?*

A. *No, not towards the Oakland mole, but it flares right out in front of the slip.*

Mr. CAMPBELL. Q. Doesn't it flare out parallel with the fairway you are running on?

A. Not parallel, no, because we don't run altogether parallel; we have got to run with the tide; it would not do to have that bell parallel; if there was a flood tide, we would have to be more to the northward, and if an ebb tide to the southward, 2 points to 2½ points difference in our course. This course I am steering on, I have steered for over 10 years, to same course.”

(Apostles, pp. 86-87.)

The flare-out of the slip is thus placed so as to throw the sound *straight out*, from the slip, and not toward the Oakland mole from whence the “Transit” was coming. If, as the master says, the slip bell

could not be heard very well on either side of the line of the flare-out, how could it possibly be heard *on this particular trip*, eight minutes earlier than usual, when the "Transit" was crossing the bay, not on a course directly from the mole to the slip, but on one (S. W. $\frac{1}{2}$ S.) which carried the "Transit" *further to the northward, and thus to one side of the flare-out*, to allow for the effect of the flood tide and slow bell? (Apostles, pp. 57-8.) Surely, if the flare-out pointed right out from the slip so as to make it equally of use in ebb and flood tides, and the bell could only be heard when the "Transit" was straight in front of it, six or seven minutes off the slip, it is not reasonable to believe that the bell was heard on the "Transit" while she was still 15 minutes off, on a course which carried her to the northward of the slip, out of the range of the flare-out.

Again, that it was the "Fullerton's" bell, and not the slip bell, that was heard finds substantiation in further attending circumstances.

The master testified that the bell came from a point right straight ahead. (Apostles, pp. 69-70.) Shortly afterward the "Fullerton's" light was observed close aboard over the jack-staff of the port corner of the bow. Thus it is certain that the "Transit" was headed directly for the "Fullerton" at the time the light was seen, a conclusion demonstrated by the fact that the "Transit" landed almost squarely across the "Fullerton's" bow after having had her helm put hard-a-port, while maintaining headway under her running speed, assisted by a full ahead on her engines. At the

time the master saw the light, the "Transit" was heading southwest. (Apostles, p. 70.)

If the position of the "Fullerton" is located upon Claimant's Exhibits 1 or 2, as stated by the master of the "Transit", to wit, 1000 yards, E. N. E. from the slip, and a line is drawn through such position, N. E. and S. W. indicating the course of the "Transit" at the time the "Fullerton's" light was seen, it becomes apparent at once that *the slip* on which the bell was located *was not straight ahead of the "Transit", on such a course, but far to starboard.* It follows, therefore, that if the "Transit", at the time the bell was heard straight ahead, was running directly toward the "Fullerton", on a southwest course, it must have been the latter's bell that was heard ahead and not the slip bell then bearing to one side.

The logic of this conclusion finds support in the master's explanation of their utter disregard of the whereabouts of the "Fullerton". He testified that there was no query raised in his mind as to why the "Fullerton's" bell was not heard, because he thought that he was far enough to the northward of the "Fullerton" not to hear it, and did not suspect that he was in her vicinity. (Apostles, pp. 79-80.)

In thus thinking that he was to the northward when he heard ahead what he accepted as the slip bell, he must have anticipated hearing it from that direction when the "Transit" would in fact reach a position to the northward of the "Fullerton". But he was not then to the northward, hence the bell he heard ahead

could not have been the slip bell, as the latter, if heard at that time, with the "Transit" headed southwest toward the "Fullerton", would have sounded not from ahead, but from starboard. If, while on a southwest course, the "Transit's" bow would point to the slip when to the northward of the "Fullerton", it certainly would not be toward the slip after the "Transit" had drifted southward to the vicinity of the "Fullerton", if the compass course remained unaltered.

The bell, then, which would be heard ahead when the "Transit" was to the northward of the "Fullerton", steering southwest, could not be the same bell heard ahead when she was more to the southward, still steering the same compass course. Under these circumstances, the fact that within a few minutes after the bell was heard, the "Fullerton's" light was seen practically straight ahead, makes it certain that the bell in question heard ahead was the "Fullerton's".

Yet even more significant is the fact that though the bell was heard before, it was not heard after the collision. (Apostles, p. 53.) If it was the slip bell that was being rung so that it was heard by the "Transit" 22 or 23 minutes after she left the Oakland side, why was it not heard by those on the "Transit" after the collision, for admittedly the "Transit" was then closer to the slip than when the bell is claimed to have been first heard? Further, if the slip bell was being rung at the time claimed, to assist the "Transit" in locating the slip, for which purpose it was installed, why did its ringing cease upon the collision? Cer-

tainly no reason existed for its stopping as the "Transit" had not then had time to reach the slip; on the contrary if being rung to assist the "Transit" in anticipation of her arrival, there was every reason, upon her failure to appear when due, for the ringing to continue, with even greater vigor, until the "Transit" either arrived, or her failure to reach the slip was explained to those on shore. Certainly no logical reason can be given for the slip bell then ceasing to ring. As those in charge of the slip bell for appellee were not called as witnesses, we have no opportunity of inquiring into the strange coincidence, if it be a fact that the bell had been ringing prior to the collision.

Those on board the "Fullerton" at the time of the collision testified to the ringing of her fog bell, and the court so found as a fact. Such finding having been made by the trial court, after hearing the witnesses, this court will not disturb it on appeal unless it clearly appears that it was against the evidence.

The Bailey Gatzert, 179 Fed. 44, 48.

All of the foregoing circumstances lead to but one reasonable conclusion, that the "Transit's" witnesses, thinking they were further to the northward of the "Fullerton" than they were, mistook her bell, actually heard ahead, for the slip bell, which they expected, in such assumed northward position, to be heard ahead.

Thus hearing the "Fullerton's" fog bell forward of her beam, the "Transit" was in positive violation of Rule 16, for it is manifest, first, that the "Fullerton's" position was not ascertained on hearing the

bell, as the "Transit's" witnesses mistook it for a land fog signal, and second, that she did not immediately stop her engines, and then navigate with caution. The effect of such violation of the rule was to impose upon the "Transit" the burden of showing not only that probably her fault did not contribute to the collision, but that it could not have done so.

Proof of that character could not be made, for it would be impossible for the "Transit" to show that even if she had stopped her engines on hearing the fog bell, the collision would have occurred. On the contrary, the probabilities are that it would not have happened as she then could have reversed and stopped her headway, or passed the "Fullerton" astern.

We respectfully submit, therefore, that the District Court erred in not holding the "Transit" in violation of the second paragraph of Rule 16 of the Inland Rules.

IV.

THE "TRANSIT" WAS NEGLIGENTLY NAVIGATED IN THAT SHE DID NOT STOP AND REVERSE HER ENGINES ON FIRST SEEING THE "FULLERTON'S" LIGHT.

The "Transit's" fault in not immediately reversing cannot be better described than by quoting from the master's statement of the circumstances leading to the collision. On direct examination, he testified:

"Q. Will you tell the court, if you please, what you did after that, within your knowledge?

A. I was watching my compass and making my course to the best of my ability when I heard

the report from the bow, 'a light on the port bow close aboard'. *I looked up instantly and seen the light then, and I instantly shoved my helm to port and struck the jingle-bell to go ahead full speed; and then I looked up again and seen there was no chance to avoid her, and at the same time I heard my first officer say 'Stop her, Captain,' and I did so; I rang the bell.* At that time the light was over my jack-staff, and the first officer ducked down, he thought the jib-boom of this bark was going to catch the pilot-house, catch him, and he ducked to avoid it, and we landed right across her bow, and she took our smokestack out, and we got in under her jib-boom, and her jib-boom carried away our box-cars. * * *'' (Apostles, p. 51.)

(See, also, Apostles, pp. 54, 71, 73, 75, 84.)

That the master erred in ordering her engines full speed ahead is evidenced by the picturesque protest of the first officer immediately after the order for full speed ahead was given:

"Q. What signal was given to the engineer? Did you observe what signal was given to the engine room?

A. Yes, I did. He was given the jingle-bell.

Q. Then what next?

A. The captain, he put his helm hard-aport and gave them the jingle-bell, and in the meantime when he gave them the jingle-bell I seen the bowsprit of the 'Fullerton' coming right for the pilot-house, and I told the captain, I said 'For God's sake, stop your engines entirely'. We were right square across the 'Fullerton's' bow, or the vessel's bow. I didn't say the 'Fullerton's' bow, but the vessel's bow, and he gave them two-bells in the engine-room; that means for to say to stop. Then the time was so short that I don't think

the engineer had time to give half a turn or quarter of a turn on the engines.

Q. How did the ships come together?

A. The 'Transit' went right across the 'Fullerton's' bow, right under the guard until she was pretty near amidships. Her bowsprit scraped over the whistle-wire that leads from the pilot-house to the funnel, and barely missed the front of the pilot-house where the three of us was in, the captain, myself and the apprentice pilot." (Apostles, p. 92.)

The error of the master upon seeing the light of the "Fullerton" slightly over his port bow, close ahead, in ringing for full speed ahead and porting his helm, in an attempt to cross the bows of the "Fullerton", towards which he knew the "Transit" would be set by the flooding tide, clearly falls within the condemnation of the courts, as a breach of the rule requiring immediate reversal on approaching another vessel in a fog.

We shall content ourselves with reference to a few decisions, out of the host that might be cited, to show the general application of the rule:

The State of Alabama, 17 Fed. 847, 853;

The Pottsville, 24 Fed. 655;

The Wyanoke, 40 Fed. 702;

The Nymphaea, 84 Fed. 711.

We respectfully submit, therefore, that the District Court erred in not holding the "Transit" at fault for failure to immediately reverse her engines on seeing the "Fullerton's" lights.

V.

THE "TRANSIT" WAS NEGLIGENTLY NAVIGATED IN THAT HER MASTER WAS IN THE PILOT-HOUSE, ENGAGED IN STEERING HER, INSTEAD OF DEVOTING HIS UNDIVIDED ATTENTION TO THE DUTY OF MASTER IN HER NAVIGATION, AND IN THAT NO NAVIGATING OFFICER WAS STATIONED OUTSIDE OF THE PILOT-HOUSE.

Vessels have been frequently condemned for want of proper lookouts stationed forward, to detect the presence of other vessels and report them to the navigating officer in command, as the courts have required no rule for the prevention of collisions to be more strictly observed.

The Colorado, 91 U. S. 692; 23 L. ed. 379.

The due regard for safety which thus demands the stationing of lookouts, necessitates the presence of a navigating officer, ever prepared to instantly act in the control of his vessel as the exigencies of the situation require, either upon his own information or upon advices received from the lookout. To thus require the maintenance of a vigilant lookout without having an officer in control equally diligent in the performance of his duties as the one in command, would be as fatal to careful navigation as would be the keeping as lookout of one who had other duties to perform.

The dual capacity in which the master of the "Transit" acted was palpably violative of this requirement of proper navigation. He was in command of the "Transit", the one who was giving all directions to the engineer. (Apostles, pp. 61, 92, 98, 107, 109.) At

the same time, he was also doing the work of a quartermaster, steering the "Transit" across the bay. (Apostles, pp. 51, 52, 61-2, 67, 68-69, 71, 73, 74, 75, 76, 98, 109.)

Can it be said that such was proper navigation? The admitted circumstances leading to the collision is its best refutation. The "Transit" left Oakland mole at 10:53 p. m., with the master in command and manipulating the steering wheel, on a trip across the bay, on which numerous vessels were known to be plying, to Mission Bay slip, off from which the "Fullerton" was known to be anchored. Shortly after leaving the mole a dense fog was encountered, which continued throughout the remainder of the trip. Notwithstanding the fog, the master remained in the pilot-house, standing approximately two and a half feet back from the window, with his eye fixed upon the bright compass card, lighted by the binnacle, and his attention closely centered upon the maintenance of the steamer's compass course. Suddenly, at a time when, from the course he had been steering, he thought he was to the northward of the ferry slip, he was advised by the lookout on the lower deck of a light on the port bow, close aboard. Not on watch for lights, *he instantly looked up*, and seeing the light, shoved his helm hard-aport, rang the jingle-bell full speed ahead, and *then looked up again*, and saw no chance to avoid her. At the same time, hearing his first officer say, "Stop her, Captain," he rang his stop bell and "landed right across her bow".

What could be more manifest than that the double duties which the master was performing, prevented his undivided attention to the navigation of the vessel? The fact that the master did not see the lights of the "Fullerton" until he "*looked up*", and did not observe the error of his going full speed ahead on his engines until he had "*looked up again*", after turning his attention to the manipulation of the steering wheel, shows that for a moment, at least, he could not diligently perform his duties as master. Had he been stationed outside of the pilot-house, alert to his duties as master, and not distracted by the work of operating the steering wheel, he would have been free to have fixed his undivided attention upon the light, even if he did not, from his elevated position, first discover it, and would doubtless have determined more quickly than he did, the error of his ordering full speed ahead under a hard-a-port helm in an effort to cross the bows of the anchored vessel.

The condemnation deserved by the practice of thus burdening the master of a large, unwieldy car-ferry, traversing, in foggy weather, waters over which thousands of lives are daily transported, to say nothing of the safety of ships, cannot be more aptly made than in the words of Mr. Justice Clifford, in

The Colorado, supra,

wherein he said:

"Steamers of such size, under such circumstances, ought never, in a dark night, to be without a watch on deck sufficiently effective to change the course of the vessel with celerity, without withdrawing

the lookout from his station and appropriate duties; nor is it good seamanship for the officer of the deck, if without any assistant in the navigation of the vessel, to station himself in a position where he cannot in such an emergency give immediate signals to the engineer in charge. Even seconds are of great importance when the peril is impending and the danger imminent, as the lives of all on board and property to a large amount may be sacrificed by a moment's delay."

(23 L. ed. 379, 382.)

It was not alone, however, in the fact of the master performing two separate and distinct duties that the "Transit" was negligently navigated. Equally flagrant was the navigating officer's failure to keep to his station outside of the pilot-house. Instead, the master, the first officer and the assistant pilot were all snugly behind two open windows, the master at least two and a half feet back of the one nearest to him. Thus placed, with his attention on the steering, he might as well have been within four solid walls so far as any contribution on his part to the navigation of the steamer in the fog, as the officer in command.

Palliation is offered in the fact that the chief officer *leaned out* of one of the two open windows. Rather than supplying the deficiency in careful navigation, the fact of the first officer doing as he did, only emphasized the negligence of the navigating officer in not keeping to his station outside, for, if the fog signals of other vessels could have been heard better within, than without, the pilot-house, so as thus to have justified the position of the navigating officer,

the first officer, if diligently attending to his duty, *would not have leaned out of the window*, “listening for any kind of a noise”. (Apostles, pp. 89, 173.) The very fact of his leaning out, therefore, shows conclusively the necessity of the navigating officer being without, and not inside, the pilot-house.

In thus remaining in the pilot-house during the prevalence of fog so dense as to be impenetrable more than 200 feet, the conduct of the officers was hardly commensurate with the degree of care which the maintenance of five lookouts on the lower deck demonstrated to be necessary to the safe navigation of the “Transit” across San Francisco Bay.

We respectfully submit, therefore, that the “Transit” was negligently navigated in the particulars specified.

VI.

THE COLLISION IS NOT TO BE ATTRIBUTED TO INEVITABLE ACCIDENT OR INSCRUTABLE FAULT.

To support the District Court’s decision of inevitable accident, this court must find that the “Transit” was without fault and that she could not have prevented the collision by the exercise of ordinary care, caution and maritime skill.

The Morning Light, 2 Wall 550; 17 L. ed. 862.

In view of the fact, as we have already pointed out, that the “Transit” has not overcome the presumption of fault resting against her for having collided with an

anchored vessel, the position of which was previously known; that she was running at an immoderate rate of speed, excessive both *per se*, and in that she could not stop before striking the "Fullerton" after seeing the latter's lights through the fog; that she was not stopped and navigated with caution upon hearing the "Fullerton's" bell, as required by rule 16 of the Inland Rules of Navigation; that her engine was so constructed that it could not be immediately reversed; that she was not stopped and reversed immediately upon seeing the "Fullerton's" light, but instead, her engine was put at full speed ahead, and was then stopped at the time she was upon the "Fullerton"; that her master was not attending to his duties as such, but performing the work of a quarter-master; and that no navigating officer was maintained outside of the pilot-house, though the steamer was traversing, in a dense fog, a bay frequented by many passing vessels, each and every of which acts condemn the "Transit", it is impossible, we respectfully submit, for the court to hold that the "Transit" was so without fault as to have shown her to be in full compliance with the rules governing collisions between moving and anchored vessels. Unless she has affirmatively shown herself to be free of fault, the defense of inevitable accident cannot prevail.

Nor, for the same reasons is the decision of the District Court sustainable on the ground of inscrutable fault. To constitute inscrutable fault, the court must find that a fault has been committed, but be unable, from conflict of testimony, or otherwise, to locate it.

The Worthington and Davis, 19 Fed. 836.

The District Court did not find any fault on the part of the "Fullerton". She was anchored within a permitted zone, her position being known to the "Transit" for a long time prior to the collision; her light was burning, and her fog bell ringing, all in strict compliance with the duties resting upon her as an anchored vessel.

On the other hand, we have previously pointed out fault after fault on the part of the "Transit", which, on the testimony of her own witnesses, makes her solely responsible for the collision.

We respectfully submit, therefore, that the court erred in holding the collision to be the result of inevitable accident or inscrutable fault.

We further respectfully submit that the decree of the District Court dismissing the libel of appellant should be reversed and the cause remanded to the District Court with instructions to enter a decree in favor of appellant (cross-libelant) and against appellee (libelant) in such sum, with interest, as appellant shall prove to have been damaged by reason of said collision, together with such other and further relief as shall be deemed to be meet and equitable in the premises.

October 18, 1913.

Respectfully submitted,
 EDWARD J. McCUTCHEN,
 IRA A. CAMPBELL,
 McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

No. 2262

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MISSION TRANSPORTATION AND REFINING
COMPANY (a corporation), claimant
of the Barkentine "Fullerton," etc.,
Appellant and Cross-Appellee,
VS.

SOUTHERN PACIFIC COMPANY,
(a corporation),
Appellee and Cross-Appellant.

BRIEF FOR CROSS-APPELLANT.

First. Statement of the Case.

This is a case of collision between the barkentine "Fullerton" and the Southern Pacific car-ferry "Transit" on December 13, 1909, at about 11:25 P. M.

The "Fullerton" was lying at anchor in Mission Bay in a position regarding which there is conflict of testimony. It is part of the case that she was anchored in a proper place, but we contend that her place of anchorage was improper.

The collision occurred in a heavy fog.

The steamer "Transit" was one of the regular freight car ferries of the Southern Pacific Company and was on one of her regular trips from Oakland pier over to Mission Bay. She has passed the "Fullerton," during the period of the latter's anchorage, on several trips per day. Shortly after the "Transit" left the Oakland side, the fog set in. After that she proceeded under slow bell, a speed just consistent with steerage way.

One of the questions of fact entering into this case is, whether the "Fullerton," enveloped in fog as the "Transit" approached, sounded her fog signals. It is claimed for her that she did; but we contend that she failed to do so, and that her failure was one of the causes of the collision.

Second. Specifications of Error.

For convenience, the points involved in our assignments of error (Ap. p. 197) will be discussed under the following headings:

I.

The "Fullerton" was lying at an improper anchorage.

II.

Therefore the presumption of fault ordinarily imported to the moving vessel does not apply.

III.

The collision was caused by the negligence of the "Fullerton."

IV.

The navigation of the "Transit" was without fault.

Third. Argument.

I. THE "FULLERTON" WAS LYING AT AN IMPROPER ANCHORAGE.

The testimony is contradictory as to the place of her anchorage.

a. *Bearings taken by "Fullerton" witnesses.*

The "Fullerton" witnesses, of course, testify that they took bearings of her position, and that these bearings take her out of the forbidden anchorage. The accuracy of the bearings they took may be seen from the various positions in which they locate her on the chart (Claimant's Exhibit).

The master of the "Fullerton" located her at the point *F* (Ap. p. 139).

Her nightwatchman locates her at the point *H* (Suppl. Ap. p. 5).

Appellant's witness, R. B. Hemming, Sr., ex-mariner and visitor on board, took her bearings at about half past four on the afternoon of the collision, from "second nature" (Suppl. Ap. p. 70).

He located her at the point *K* (id. p. 67).

Appellant's witness, Ferris, marine superintendent of the Union Oil Company, which operated the "Fullerton," places her at the point *L*.

These witnesses are all interested in locating the anchorage place of the "Fullerton" as far away from the "Forbidden Anchorage Ground" established by the State Harbor Commissioners as possible. The testimony of these witnesses is interesting in several respects. It shows, in the first place, how much reliance can be placed upon these so-called "bearings," the locations established by them varying by more than one-half a mile, a difference of exceeding importance in connection with this case. It shows, in the second place, that the two important witnesses for the "Fullerton" (being practically her only eye and ear-witnesses of the collision) practically agree upon her position—possibly because they are father and son, or possibly because they are better mariners than the master of the vessel. They place the "Fullerton" more than twice as far from the ferry-slip *T* as the master of the "Fullerton," who, ordinarily, would be presumed to speak with greater authority on this subject than the boy who acted as nightwatchman, or his father, who was a casual visitor on board. Obviously the bearings taken by the "Fullerton" witnesses do not tell us within more than half a mile where she lay at anchor.

- b. *Other testimony by "Fullerton" witnesses as to her anchorage place.*

The witnesses for the "Fullerton" give testimony, however, which is a better index to the position in which she lay at anchor.

Captain Grant testified, in answer to Mr. Campbell's questions:

Q. Had you ever seen the car-ferry "Transit" come across the bay and land at the ferry slip?

A. I have never noticed it land. I have seen it pass by the ship.

Q. Which way coming and which way going on those trips?

A. One going to Oakland and one to the city on the east and southwest, approximately.

Q. *How close would she pass to the anchored position of the "Fullerton"?*

A. *Sometimes she would pass within 100 feet of us when we would be lying to an ebb tide; she would pass within 100 feet of us, sometimes perhaps closer. (Ap. p. 144.)*

Again he says, on cross-examination:

A. Well, the engineer remarked to me that she used to come too close, and *I have had to haul my boat up lying astern to get clear of her. On certain stages of the tide she came too close to the ship. (Ap. p. 159.)*

Q. You noticed, also, she used to come too close?

A. Yes, sir.

Q. Was that the regular thing, that she was passing you at a very short distance?

A. As I say, at certain stages of the tide you could come close and at flood tide keep away.

Mr. FOULDS. Q. When the tide was ebbing she would come closer sometimes?

A. Closer on an ebb than a flood. The ship would be farther away from the fairway and naturally keep away to counteract the tide. (Ap. pp. 159, 160.)

The *night watchman* testifies, on direct examination:

Q. How many times during the period that you were stationed aboard the "Fullerton" would you say that the "Transit" had passed back and forth across the bay?

A. Well, to my knowledge she had a very irregular service there; sometimes she would make several trips a day and other times she only appeared to make about 3 trips a day.

Q. How close would she pass to you on the different tides?

A. Well, *that distance varied; at times she would come up so close that I would have to haul my small boat up out of the way.*

Q. *On what tide would that be?*

A. *On an ebb tide.*

Q. Which *way* would the stern of your vessel be drifting?

A. The stern would be tailing to the northward.

Q. How close would she pass to you on the flood tide?

A. *Well, sometimes she came up quite close even on the flood tide.* (Suppl. Ap. p. 17.)

Again he says:

A. There was only once that she came very close to us—a fog before; then she crossed our *bow* when we were laying at an ebb tide. (Suppl. Ap. p. 17.)

It, therefore, appears from the evidence of the "Fullerton" that she was lying so close to the fairway of the ferry boat that the latter would pass within 100 feet to the north of the "Fullerton," sometimes perhaps closer; sometimes so close that the small boat of the "Fullerton" had to be hauled out of the way. Once, in a fog, she crossed the *bow* of the "Fullerton" at an ebb tide, that is to say, she passed the "Fullerton" on the *south* side of the vessel. All this testimony comes from the "Fullerton" side. It shows conclusively that those responsible for the "Fullerton" were well aware that she was in danger of being run down by the ferry, if she remained in her position. That the ferry would come dangerously near; that the small boat was only saved from collision by being hauled up; that the ferry passed the "Fullerton" on either side—all these are *facts* shown by the "Fullerton" witnesses. It is submitted that such facts are more eloquent and more conclusive than rough bearings taken by eye or with a pencil, and that these latter guesses, where in conflict, must yield to the fact admitted by the "Fullerton" that, during the time she lay at her anchorage, the ferry steamer would come dangerously near on either side. The misconduct of the "Fullerton" is fully made and by her own proof.

The fact that the "Fullerton" lay practically in the fairway of the ferry boat, is also shown by the testimony of the witnesses on our side. Granting that originally, two months or more before the acci-

dent, she was placed south of the line AB, the uncontroverted testimony shows that, some days before the collision, she lay in the fairway of the "Transit."

Captain Higginson of the "Transit" testifies that, a couple of days previous to the collision, there was a southeast storm on the waterfront; that, as a result thereof, the vessels in the neighborhood came to a new anchorage. Before the storm the captain had taken no close notice of the "Fullerton," but after the storm he took her bearings, "*because she was then in our fairway*" (Ap. p. 59). "I got her bearings simply to avoid her in case of a fog" (Ap. p. 58). He says, on cross-examination:

Q. As a matter of fact, on several occasions in passing across the bay, you had been so close to the "Fullerton" it was necessary for them to haul their boats in?

A. On the last three or four days she was in our fairway.

Q. Was it confined to that time?

A. It was confined to a few days before the collision, after the storm, after the southeast storm.

Q. At the time you say you took a bearing of her?

A. Yes.

Q. What was the bearing?

A. From the slip, where my boat lay in the slip, it was east, northeast. (Ap., p. 59.)

This testimony is fairly corroborated by *Dr. McAdie*, called as a witness by the other side for the purpose of disposing of the southeast storm; but his

records show that southerly winds prevailed from December 4 to December 10, 1909, and that, on December 4, and again on December 8, 1909 (nine and five days, respectively, before the collision) the southerly winds reached a maximum velocity of 33 miles (Suppl. Ap., p. 64). Claimant's chief witness, the night watchman of the "Fullerton," admits that, in the month of December "we had several blows" (Suppl. Ap. p. 7).

It is submitted that the testimony of Mr. Ferris (Suppl. Ap. pp. 77, 78) is the admission by an interested witness that, under the circumstances of this case, the "Fullerton" might well have dragged her anchor and drifted into the fairway when the southwest wind was blowing which Dr. McAdie's records disclosed.

The evidence above referred to shows, by a great preponderance, that the "Fullerton" in the night of the collision and for a number of days before, was lying in the fairway of the ferry steamer "Transit"; that she knew it, and had, on previous occasions, barely escaped the dangers incident to her position. In spite of this fact those in control of her made no effort to remove her to a safe anchorage place. There was abundant safe anchorage ground to the south of her. We are not dealing with a case like those of dredgers which have a legitimate business purpose in anchoring in particular localities, but with the case of a vessel which was laid up for months and made its home in a dangerous local-

ity, although fully aware of its dangers, and although there were an indefinite number of safe places where she could have settled down for her long rest. It was at all times in her power to avoid all danger by moving to a safe distance. Ordinarily prudence would have dictated such a course after she saw that previous collisions with her small boats could only be avoided by hauling them in. She voluntarily and unnecessarily exposed herself to some danger even in ordinary weather; this danger, from being slight in the day time or in fair weather, became great in a fog. When she insisted on becoming a fixture on a public highway, she assumed the risk of coming into collision with one who was using the highway in a legitimate manner.

The theory of the "Fullerton" seems to be that she is without fault as long as she is not actually in the zone of "Forbidden Anchorage"; that all waters not forbidden are "permitted waters." It is submitted that this theory cannot be relied upon. She is to be charged with fault if the Court finds that, as her own evidence shows, she remained anchored so near to the fairway of the ferry steamer that there had been previous narrow escapes from collision with the steamer, which was sometimes obliged to vary her ordinary course in *accordance with* the condition of the tide and winds.

II. THERE IS NO PRESUMPTION OF FAULT AGAINST THE "TRANSIT".

The cases upon which appellant relies for the proposition that the burden of proof is upon the "Transit" to exonerate herself from liability are predicated upon the condition that the anchored vessel was without fault. The *Oregon*, *The Virginia Ehrman*, *The Clara Clerita*, *The Europe*, are all cases of that nature. In the case of *The D. S. Gregory*, Fed. Cas. 4102, cited by appellant, Judge Nelson says expressly:

"If I could agree that there was fault in anchoring a vessel there, I should have but little difficulty in coming to a different conclusion" (11 Fed. Cas. p. 429).

The Bedford, 3 Fed. Cas. No. 1216, also cited by appellant, is a very good illustration of the point where the usual presumption against the moving vessel breaks down. In that case a schooner lay at anchor "*near the track*" of a ferry boat. The collision took place about eight in the morning; the schooner had cast anchor at about twelve o'clock the day preceding. The mate had been warned about his position. "Indeed, the mate himself states that, while lying at anchor from the preceding day, the ferry boats passed him on his bow at ebb tide, and on his stern at flood tide, the tide tailing his vessel up or down the river as it was ebb or flood." Judge Nelson said that:

"It was a fault on the part of the schooner to cast anchor within the forbidden limit, and

a still greater one not to remove when the attention of the mate was called to the fact and he was warned of the danger."

The ferry boat also was held in fault, for failure to use proper precaution.

It is clear that Judge Nelson did not apply the presumption against the moving vessel in this case, but based his decision on the actual proof of the facts. Had he applied the presumption, no evidence of lack of proper caution would have been required to hold the ferry boat liable. The case clearly illustrates that the presumption contended for by appellant does not apply to a case where the anchored vessel is in an improper place.

The case of *The Rockaway*, also cited by appellant, is a case where the Court found easily that the vessel at rest was properly anchored. In fact, she had just arrived in port and was anchored by a pilot in the vessel anchorage ground, known as the "Poor House flats" (19 Fed. p. 450). The occurrence was in New York harbor, a harbor far more crowded with shipping, and where the ferry boat winds its way on an uncertain course through the shipping in its way. It should also be kept in mind that a Court might well find that a vessel just arrived in port may, before proceeding to its place of discharge, come to a proper anchorage in a place where it would be entirely improper for her to anchor as a permanent resting place.

We recognize the validity of the general rule in admiralty as laid down in the cases of *The Virginia Ehrman* and *The Oregon*, that the moving vessel must keep away from a vessel properly anchored and not otherwise at fault, and that collision in *such* cases, raises a presumption of fault against the vessel in motion, placing upon her the burden of exonerating herself from blame for the collision.

But we contend that, where the anchored vessel is improperly moored in the fairway, or appears otherwise at fault, the general rule does not apply.

It was so held in

Graves v. Car Ferry Transp. Co., 183 Fed.,
378 (C. C. A. 7th Circ.).

In that case the Court found that the vessel at rest was improperly anchored, on facts far less conclusive than the facts in the case at bar. In the *Graves* case the anchored vessel was simply "within the usual course of navigation of other vessels," when she could have anchored in better anchorage; in the case at bar she had direct previous indication of the danger of her position. In the *Graves* case the anchored vessel was in the particular place merely while waiting for the arrival of her towing steamer; in the case at bar she insisted on remaining a fixture in a public highway while out of commission for an indefinite period. It is easier in the case at bar than it was in the *Graves* case to find, as a fact, that the vessel at rest was

improperly anchored. When this fact is once found, the principles of the *Graves* case govern wiping out the presumption against the moving vessel. The Court said:

“The general law of the sea becomes applicable to such collisions, when the anchored vessel is improperly moored in the fairway, or otherwise appears at fault (*Ross v. Merch. & Miners Transp. Co.*, 104 Fed. 302; *City of Birmingham*, 138 Fed., 559; *The Sciote*, Fed. Case No. 12,508, and notes).”

In *Ross v. Merch. & Miners Transp. Co.*, 104 Fed. 302, the Circuit Court of Appeals, First Circuit, said, by Circuit Judge Putnam, after discussing cases of vessels properly at anchor:

“But this appeal differs from each of the last two cases cited, in the fact that there the vessels injured were dredgers located at the places where it was necessary that they should be at work, while here the vessel injured was a barge, *not engaged in work and of light draft, so that she could easily have been anchored at some point clear from all possibility of endangering vessels proceeding up and down the channel.* The same rules of obligation to use care (that is, to avoid endangering the usual paths of commerce) apply, as apply with reference to obstructing any other highway unnecessarily.”

In *The City of Birmingham*, 138 Fed. 555, C. C. A. 2nd Circ., the Court says:

“The Courts should not encourage laxity and shiftlessness by rewarding a master who places his craft in a position of danger simply because it is too much trouble to place her in a position of safety.”

In *The Milligan*, 12 Fed. 338, the Court says:

“While the sloop was not lying upon the range of lights, she was *dangerously near* it, subjecting passing vessels to the exercise of unusual care. The position was not forced upon her; she might have anchored lower down. She would then have been out of the way and out of danger. Her anchorage so near the center of a narrow channel was inexcusable.”

(The same criticism applies to anchorage dangerously near the fairway of a regular ferry steamer.)

In *The Europe*, 175 Fed. 596, 607, Judge Wolverton says:

“It is a rule that a moving vessel must keep out of the way of one at anchor. This because the one at anchor is practically helpless, and is usually so conditioned as to be unable to relieve herself readily in stress of emergency. The rule is applied with great strictness, the vessel at anchor being in a proper place. In such case the presumption of fault lies against the vessel in motion. This presumption, however, does not obtain where the anchored vessel was where she should not have been. A vessel anchored where she should not be must take the consequences of her own improper act.”

The above cases show that the presumption upon which appellant rests its case has no application to this case.

III. THE COLLISION WAS CAUSED BY THE NEGLIGENCE OF THE "FULLERTON".

A. *Degree of care imposed upon the "Fullerton".*

In *The Ailsa*, 76 Fed. 868, a steamship anchored in a dense fog in a channel way, in improper place. The large steamer, *Bourgogne*, ran into her. Judge Brown said:

"The conclusion that the *Ailsa* was anchored much outside of anchorage limits, and right in the path of vessels seeking customary anchorage, *fixes upon her the primary responsibility for the collision, within the settled adjudications.*"

The "Fullerton", by her own evidence, remained in a situation where she was exposed to *danger of collision*; but it is settled that the duties of care which she owed to the "Transit", while she remained in the dangerous anchorage place, were of the highest order.

The precautions taken by a vessel anchoring in a dangerous position must be commensurate with the perils assumed.

In *The John H. Starin*, 122 Fed. 286 (C. C. A. 2nd Circ.) the Court said:

"The Courts have frequently held that the precautions taken by a vessel voluntarily anchoring in a dangerous position should be commensurate with the perils assumed," citing *The Clara*, 102 U. S. 200; *The Sapphire*, 11 Wall. 270, and other cases.

In *The Europe*, 175 Fed. 596, Judge Wolverton states the rule as follows:

“The rule is, as it respects a vessel at anchor in the fairway, that she must take precautions commensurate with the danger she presents to shipping. If the danger is great, the care to prevent collision and accident from other ships navigating the water should be correspondingly great. If of lesser moment, the precaution may be diminished accordingly.”

See also

The City of Birmingham, 138 F. 555;

The Clara, 102 U. S. 164.

B. *The precautions taken by the “Fullerton” were not commensurate with the perils assumed in a foggy night.*

a. *The “Fullerton” night watch was insufficient in foggy weather.*

While the “Fullerton” was lying in the fairway of the ferry steamer, she was left in charge,—in the day time,—of a watchman who was blind in one eye (Suppl. Ap. p. 61), and in the night time, of a young man, Robert Boyd Hemming, Jr., who was not a sailor, but acted as watchman and engineer. His functions were as follows:

A. Kept the lights clean and burning, rang the bell in case of fog; in case the wind should rise and there was danger of the ship dragging the anchor, letting go another anchor, or pay out more chain, and when the wind went down, take up an anchor, so as not to let the anchors get foul. (Suppl. Ap., p. 24.)

He was in charge of the engine, which naturally required some of his time in the engine room. He was also the lookout, which naturally required him to be out of the engine room. Even when everything ran smoothly, and there was no fog, there was enough work to keep a bright young man busy.

As far as the master was concerned, the only instructions he gave were:

A. He said one of us to keep the night watch, and the other the day watch on the vessel.

Q. Then you arranged it between yourselves that you were going to keep the night watch?

A. Yes. (Suppl. Ap., p. 31.)

In a foggy night, like the one in which the collision happened, this young night watchman and engineer was charged with too many duties to perform any of them with the care commensurate with the occasion.

In the thick fog which prevailed after 11 o'clock, one of the young man's duties was, as he was well aware, that "the bell has to be struck rapidly for about five seconds, at intervals of not more than a minute" (Suppl. Ap., p. 27). While he rang the bell, he was "on the fore-castle-head and the main deck, both, at different times" (p. 29).

Q. You did not stay in one place?

A. No, I was walking the deck.

Q. You were walking the deck? What were you walking the deck for?

A. To keep warm. (p. 29.)

It is thus clear that, in the foggy weather, before the collision, the young man had to move pretty lively to keep warm and also to keep his bell ringing and to act as lookout. These two occupations would have made it impossible for him to attend to his engine, if anything had gone wrong there. The engine was a gasoline engine, and the Court may take judicial notice of the whimsical nature of such an apparatus. Now, it appears that if anything had been wrong with the engine, it would have been the duty of the young man to quit his job at the bell and on the lookout, and to, presto! assume his job as engineer.

Q. If the engine had run irregularly, the engineer would undoubtedly have run down to the engine *and let the fog bell go for a while?*

A. *That would have been his duty.*

(Deposition of the Master, Ap., p. 161.)

When asked with reference to striking the bell:

Q. Could he do it in the engine room?

The master answers:

A. No, sir. (Ap., p. 162.)

The condition of affairs on board the "Fullerton" is thus described by the master:

Mr. HENGSTLER. Q. It is a fact, is it not, Captain, that he could not work the engine and bell at the same time?

Mr. FOULDS. Q. (Intg.) If anything had gone wrong?

A. I presume if he had to work the engine, he would call the other watchman.

Mr. HENGSTLER. Q. You presume?

A. Certainly.

Mr. FOULDS. Q. He could not do both at the same time?

A. No, sir. A watchman * * *

Q. You recognize, of course, there was a possibility of the lights going out, and that is the reason you had him there?

A. *He was there to look out for his engine, and to keep it in repair.* As a rule, * * * that night."

The day watchman's quarters were in the stern of the vessel; he was separated from the night watchman by the whole length of the vessel. He retired at 9 o'clock and went to sleep about half an hour before the collision (Suppl. Ap. p. 59). Obviously, some precious minutes would have been necessary if, in a fog, the engineer had called the night watchman away from the bell.

These facts show that the precautions taken by the "Fullerton" in case of heavy fog, and while she remained lying at anchor in a place where she had previously had narrow escapes of collision with the ferry boat, were not commensurate with the dangers which she assumed.

While she remained in that situation, ordinary prudence would have required that there should be two men on watch in a dense fog,—one to see to the engine and the lights, and the other to attend to the bell. Had a bulb blown up, or the gasoline engine put out the electric lights, these two men would have been extremely busy to keep the vessel

within the requirements of the law, as to lights and fog signals. One was plainly insufficient for such a purpose. Had the vessel burnt oil lamps, some excuse could be urged for having only one night watchman; for such lights are more reliable than electric bulbs, which depend for their efficiency on the notorious freaks of a gasoline engine requiring eternal watchfulness.

b. *The "Fullerton's" fog bells were not properly sounded.*

Judge Dietrich found that, "although the greater number of witnesses gave *negative* testimony in support of the libelant's contention that the 'Fullerton's' bell was not properly sounded, it is not sufficient to overcome the positive statements of the three men who were upon the 'Fullerton', to the effect that the bell was being rung in the manner required by the rules."

Apparently the learned Judge based this finding upon the superior weight ordinarily awarded to positive testimony as against negative testimony.

The testimony of the "Fullerton" witnesses is as follows:

The watchman, Robert Boyd Hemming, Jr., testifies:

It set in foggy around 9 o'clock and I only rang the bell a few times, and she lifted, the fog lifted; about 11 o'clock it started in setting in foggy, and I started in ringing the bell again. I heard the "Transit" approaching,

what I believed to be the "Transit" from her whistle. I kept trying to look out for her, and *kept striking the bell in between her whistles*, when I had a chance, so as to give somebody on her a show to hear it. It was not very long after I heard her whistle that I *saw the loom of her lights through the fog*, and when she was about three ship-lengths away, I could see both of her range lights, one immediately after the other. She was *approaching us on our starboard side just a little forward of amid-ship*, it seemed, from where I was. Then she seemed to turn and cross our bow, and if I remember rightly, I *heard two or three short blasts, like a short blast from a whistle*.

Q. Will you state whether or not you rang the bell during the time the fog prevailed after 11 o'clock?

A. Yes.

Q. How would you ring it, in what way?

A. I would ring it for about 15 to 25 strokes of the bell.

Q. What kind of strokes?

A. Ding-ding, ding-dong; like that.

Q. How often would you ring it?

A. About as near as I could judge, once a minute. (Suppl. Ap. p. 15.)

Q. How long prior to the time that you first heard her whistle had you been ringing the fog bell?

A. From quarter to half an hour, something like that, a little over, may be.

Q. Was there any time during that interval that you had not been ringing the fog bell?

A. Not that I remember of.

Q. Have you any recollection that you did ring it or did not ring it?

A. Yes, I rang the bell. (Suppl. Ap. p. 16.)

The day watchman, Olaf Olson, testifies, he turned in his bunk in the steerage aft at 9 o'clock:

I was laying reading in the bunk, just shortly before the collision I was going to sleep, I fell asleep.

Q. How long before the collision did you go to sleep?

A. I could not exactly—about half an hour. (Suppl. Ap. p. 59.)

His testimony as to the bell is as follows:

Q. Do you know whether or not the bell on board the "Fullerton" was ringing?

A. The bell on the "Fullerton" was ringing. (p. 57.)

Q. How often would you hear the bell of the "Fullerton's?"

A. The bell on the "Fullerton", about every minute was ringing. (p. 58.)

Q. You say you heard the bell of the "Fullerton" ringing that night?

A. Yes, sir.

Q. From what time on did you hear the bell ringing?

A. Well, the last time I was laying and reading in the bunk. (p. 60.)

It is submitted that this testimony does not show that the witness heard the bell of the "Fullerton" at any time during the critical moments before the collision.

The third man on board, the father of the night watchman and a visitor, had retired to his room on the starboard side aft at 9 o'clock and had gone to sleep.

Q. How long before the collision did you wake up from this click you speak of?

A. I woke up before the collision, maybe five or seven minutes; something like that.

Q. Could you hear any bells or whistles?

A. I could hear the fog whistle coming closer and closer to us.

Q. Did you recognize the whistle?

A. I think I recognized it.

Q. What did you think it was?

A. I thought it was the "Transit's" whistle.

Q. Did you hear any bells ringing at that time?

A. Yes, sir.

Q. What bells?

A. The "Fullerton's." (Suppl. Ap. p. 68.)

Q. Until how long before the collision did the fog bell of the "Fullerton" continue ringing?

A. The "Fullerton" seemed to be answering the blast of the steamer; I could not tell.

Q. What do you mean by that?

A. Well, if you are ringing a fog bell and you hear a steamer close by, every time she whistles you pull the bell, you kind of answer to make sure to satisfy her and yourself that she hears it so that she will go clear.

The testimony of the night watchman is that of an interested witness, and that of his father, who spent the evening on board as a visitor of his son, may be expected to be biased in favor of his son. These two are the only witnesses who give positive testimony on the subject.

In support of the contention that the "Fullerton" bell was not properly sounded, is the testimony of the witnesses for the "Transit". They

knew the approximate location of the "Fullerton" and were all watching for the fog signals of the "Fullerton". In the fog prevailing the sense of hearing was the only means of knowledge, assuming that the bells were sounded. When they did not hear the bells, they were justified in believing that they were too far north of the "Fullerton" to be in danger of collision with her.

Captain Higginson and the first officer were standing in the pilothouse, at an open window. The window was open "so as to see and hear" (Ap. p. 48). The first officer was "leaning outside of the pilot-house with his head to listen and see—to listen more than anything else" (Ap. p. 49). The second officer and four men were stationed on the main deck, "five on the bow right forward, in front of the cargo box cars" (p. 49).

The master testifies:

I was listening for bells, for knew that the "Fullerton" was there in some position somewhere, but we thought on account of not hearing her bells that we were far enough to the northward not to hear it. (p. 53.)

Q. But you did not hear the "Fullerton's" bell before the collision?

A. No.

Q. And I understand you were listening for bells?

A. *Distinctly; that is all we could go by, the sound.* (p. 53.)

The first officer of the "Transit" testifies:

Q. So that when you left the Oakland Pier on this 10:53 trip you had in mind the location

of the "Fullerton" with respect to your ferry slip, didn't you?

A. Pretty near it, yes. (Ap. p. 107.)

I was listening for any kind of noise. I had the window down and was leaning out of the window. (Ap. p. 89.)

Q. In your opinion if you had been on the bow of the "Transit" that night when it approached the "Fullerton" and the "Fullerton" had struck her bells, would you have heard them? *Would you have heard the bells?*

A. *Most undoubtedly.*

Q. Would you have heard them from the place where you were in the pilot-house if they had been struck?

A. Yes.

Q. You were hanging out of the window there and looking about, were you not?

A. Yes.

Q. And you were listening for bells?

A. Yes.

The second officer and four men of the crew were all on the lookout, in accordance with a rule in force on board of the ferry boat in case of foggy weather. They were all on the main deck, in the bow of the boat, looking and listening for signals.

Under the circumstances we submit that their testimony that none of them heard the bells of the "Fullerton", although they were straining their ears for them, is not of a negative character in the sense that it is inferior in weight to the testimony of a witness that he sounded the bell, or the testimony of another witness that he heard the bell. The principle applies here with peculiar force that,

“When a witness is in a situation to hear a sound, and, *listening*, hears none, his statement that he heard it not, or that it was not made, is as much the *affirmation* of the fact that there was no such sound, as would be the assertion by another witness in like situation, that the sound was made, an affirmation of that fact.”

Butler v. Metropolitan St. R. Co., 117 Mo. App. 354, cited in 2 Moore on Facts, Sec. 1197.

The principle is stated in Moore on Facts, Sec. 1198, as follows:

“Where positive testimony that signals were given is met by testimony in direct denial by witnesses *who could well have heard them* if they had been given, it is generally held that the latter testimony is *positive in character, equally with the former*,” citing many authorities.

’ This principle applies with particular force to the case at bar where, apart from the officers in the pilothouse, five men were specially charged with the *duty to listen* and to locate the “Fullerton” in the heavy fog, and where the “Fullerton” had the corresponding duty of making her location known by the only means in which it could be made known to other vessels, viz.: by sounding her bell vigorously.

The “Transit” witnesses testify that, before the collision they heard the sound signals from the ferry slip on Mission Bay, farther distant from

there than the "Fullerton", and the evidence shows that it was impossible to mistake the slip bell for the fog bell of the "Fullerton" (Ap. p. 86).

The attention of these seven witnesses was monopolized by the one effort to locate the "Fullerton" by her fog bell; they were in a far better position to receive accurate impressions of sounds from the "Fullerton" than the witnesses on the other side, two of whom were not listening for bells and had no direct interest in the signals. The "Transit" lookouts were watching keenly for signals, in the performance of a special duty. "In such situation no logical reason can be given for characterizing, in law, as inferior in value testimony based upon regular knowledge. The evidence that the bell was not rung was substantial" (The Court in the Butler case, *supra*).

It is respectfully submitted that, if the testimony given by the "Transit" witnesses be regarded as *affirmative* and *positive* in its character, and of at least equal value and weight as the testimony of the two interested witnesses of the "Fullerton", the Court should come to the conclusion that the overwhelming preponderance of evidence shows that the bells of the "Fullerton" were not properly sounded.

We also beg to call the Court's attention to the fact that there is no evidence whatever in the case to show how far the bells of the "Fullerton" carried, if worked by the rope system described by

the testimony of the night watchman, while he was walking on the forecastle or athwart-ship on deck, to keep warm. It is quite probable that a bell fastened to the foremast (Suppl. Ap. p. 28) does not emit its loudest sound, if worked from the forecastle head by a bell-cord at least 6 or 8 feet long (Suppl. Ap. p. 15), the lookout striking only the side nearest to him. It would stand to reason that the proper method of getting the kind of sound out of the bell which would have been commensurate with the danger of the situation of the "Fullerton", while lying in the fairway and in a dense fog, was to manipulate the clapper by a short rope from directly underneath the bell, by striking the bell rapidly from side to side. It is quite possible to find that the night watchman told the substantial truth as to his acts, but that the sound produced was not efficient enough to give warning to approaching vessels.

IV. THE NAVIGATION OF THE "TRANSIT" WAS WITHOUT FAULT.

We do not claim that the "Transit" after knowing that the "Fullerton" was in dangerous proximity to her fairway, had any right to navigate as if the "Fullerton" was not present. As a matter of fact the evidence shows that she was navigated with the greatest caution in view of that knowledge, and that every reasonable precaution was made to avoid collision with her.

The ferry boat had an undoubted right to make her run across the bay in a fog, especially as the fog was not dense when she left the Oakland side. The "Fullerton" knew that she would pass her, and knew that she had previously passed her, in a fog, on the southern side, although her usual track was on the north side of the "Fullerton".

The situation is practically a reproduction of the collision between a ferry boat and the "Cuyahoga", described by Judge Blatchford in

The Hudson, 12 Fed. Cas. No. 6829, as follows:

"These boats were entitled to their usual track in the ebb tide, as much in the fog as when there was no fog. Those in charge of the Cuyahoga were bound to know what such usual track in the ebb tide was, and what the effect of the ebb tide was on the manoeuvres of the boats in reaching their slip at Jersey City. The Cuyahoga had anchored where she was the afternoon before, and had seen the boats passing to and fro. There were two boats, each of which passed her once in every twenty minutes. Not that these facts would justify the ferry boats in reckless navigation in the fog, merely because such was their track in an ebb tide; for, they knew that the Cuyahoga was at anchor where she was. But, the existence of the facts referred to made it incumbent on the Cuyahoga to take all prudent measures to indicate where she was in the fog. Her general presence and her general position were known; but the fog prevented her being seen at any but a very short distance, and equally prevented a light on her being seen. *Any sound from her could, however, be heard through the fog; but it is clear it was so dense as to demand that the Cuyahoga should an-*

nounce herself by audible sounds. The ferry boat was blowing her steam whistle, and her paddles, she being a side-wheel boat, made a loud noise. The morning was still and calm. A sound on the water could be heard a considerable distance—much further than vision could penetrate through a fog. The approach of the ferry boat to the Cuyahoga was, therefore, indicated to the latter, and she should have responded by sounding a bell, or blowing a horn, or striking on an anchor-stock, or shouting with the voice, or making some other audible noise. She did nothing of the kind.”

The collision in the case at bar occurred at a time of night when no shipping ordinarily moves in the neighborhood of Mission Bay. The only danger which the “Fullerton” could reasonably expect was from the ferry which, on previous occasions, had nearly collided with her.

a. *The course and speed of the “Fullerton.”*

Course—The master of the “Transit” testifies:

We steer the same course year after year, day after day, month after month, right along, the ferry system. (Ap. p. 55.)

It is regularly southwest by south, modified, however, to some extent, to meet the requirements of winds and tides. On cross-examination, he says:

We figure a great deal on the strength of the tide when we run. If the tide is running very strong, we keep up a little here.

Q. Then the allowances you make would depend upon the character of the tide?

A. Yes, sir.

Q. When you run in the fog you have that uncertainty?

A. In fog you cannot make very fine calculations. It is according to how the tide is. (Suppl. Ap. p. 82.)

The watchman of the "Fullerton" knew the influence of the tide on the navigation of the ferry; it was, therefore, all the more incumbent upon them to give fog signals that were audible at a sufficient distance to enable the "Transit" to stop.

Speed—The captain of the "Transit" testifies that the steamer proceeded on her trip across the bay "under a slow bell, that is, *as close as we could shut her off without losing steerage way*, I should say, perhaps, 7 miles an hour; perhaps a little more, or perhaps a little less" (Ap. p. 47). "I have been running over 35 years at that average speed" (Suppl. Ap. p. 81).

In answer to Mr. Campbell's questions, he says:

Q. Don't you think she would maintain steerage way at four knots?

A. *No, sir*; but as I said before, I do not know the exact amount of knots. I know when she is going slow, and we do not keep a log as you do in deep water ships; we run these under slow or fast bell.

Q. You cannot tell me *in knots* how slow that vessel can go and still maintain steerage way?

A. *No, sir*. (Suppl. Ap. p. 81.)

Two things, therefore, appear from the captain's testimony: (1) that his vessel was running as

slowly as she could without losing steerage way; (2) that, although he guessed this was about seven miles, he does not know that. It would not be fair to build a mathematical argument on his estimate as to the number of miles an hour, for which he himself disclaims authoritativeness. The *fact* is that the "Transit" ran with the minimum speed necessary to give her steerage way. She employed no greater speed than was necessary to give her pilot proper control of her in the tide that was running. She could be stopped in an emergency inside of 800 to 900 feet (Ap. pp. 77, 78). This was all that was required of her by law, as the cases cited in appellant's brief show.

a. *The "Transit's" speed was proper.*

In *The Pennsylvania*, 17 Wall, 125 (appellant's brief, p. 12), the Court said, as to proper speed of vessels.

"It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others."

In *The Nacoochee*, 137 U. S. 330 (appellant's brief, p. 14), the rule is laid down that a vessel in a fog should

"maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog."

It is submitted that, in the last case, the remarks of the Court would express the rule more correctly if for the last words were substituted the words "which she should see *or hear* through the fog". The "Transit" had a right to assume that the "Fullerton" would sound her fog signals; her speed was within the prescribed limit, if she could have stopped her way as soon as she heard the "Fullerton's" fog bell. Had the fog bell been properly sounded, it could have certainly been heard at a greater distance than 800-900 feet. This is not a case where the uncertainties of sound in a fog play a part, for the continuous bell signal prescribed for a vessel anchored in a fog, if properly given, cannot fail to be heard in any fog.

In *The Martello*, 153 U. S. 64 (appellant's brief, p. 14), the Supreme Court held a speed from five and a half to six knots an hour to be excessive, on account of the *peculiar circumstances* of the case, and entirely within the rule of *The Pennsylvania*. The Court said:

"While it is possible that a speed of six miles an hour, even in a dense fog, may not be excessive upon the open ocean and *off the frequented paths of commerce*, a different rule applies to a steamer just emerging from the harbor of the largest port on the Atlantic coast, and in a neighborhood where *she is likely to meet vessels approaching the harbor from at least a dozen points of the compass.*"

Plainly, the case at bar is one where the moving vessel was "off the frequented paths of commerce"

—in quiet Mission Bay, where, in the middle of the night, she was, in all probability, the only moving thing and had no dangers to encounter except the vessel anchored in her fairway.

The authorities cited by appellant for the proposition that a vessel must proceed at such a rate of speed in a fog as to enable her to come to a standstill before she collides with a vessel which she can *see*, are predicated upon the assumed fact that the presence within the zone of risk of the vessel collided with has been known for an appreciable time. Otherwise the rule would lead to the absurd conclusion that if a vessel is anchored in a dense fog through which other objects could only be seen, say 10 feet ahead, an approaching vessel would be at fault if she moved at a greater speed than to enable her to come to a standstill within 10 feet. No vessel could be under control at so low a speed, and the dangers of collisions would be infinitely multiplied if ships were permitted, not to say required, to sail through dense fogs at such a rate. A vessel moving through the fog cannot (as appellant would suggest) be required to move so slowly as to enable her to come to a standstill before colliding with a vessel which hides in the fog and suddenly, and without warning, appears before her eyes. It is the duty of the latter vessel to make her presence known by signals; she cannot permit the moving vessel to approach through darkness or fog, or both, to a point where

she will be *seen*. The rule is correctly stated by Judge Morrow in

The Bailey Gatzert, 179 Fed. 44 (cited by appellant),

as follows:

“A rule applicable to such a situation was to proceed at such a rate of speed as would enable her, after *discovering* a vessel through the fog, to have stopped and reversed her engines in time to prevent a collision.”

She may be “discovered” by the sense of hearing as well as by the sense of sight.

The vessel at anchor has the reciprocal duty *to enable the approaching vessel to discover her*—in clear weather, by exhibiting proper lights, in foggy weather, by sounding proper signals. Surely, if the electric lights of the “Fullerton” were only able to penetrate the dense fog for a distance of, say 25 feet, it could not be claimed that the “Transit” was at fault if she was not able to come to a standstill within the 25 feet after she could see the electric lights. Had the “Fullerton” struck an efficient bell for five seconds, at short intervals, so that the same would have carried 800-900 feet, the “Transit” could have come to a stop in time to prevent a collision. This is all that the cases cited by appellant required of her. If, for any reason, the “Fullerton” failed to indicate her presence to a vessel 800-900 feet away, she was clearly at fault.

b. *The speed was immaterial, as it did not contribute to the accident.*

Assuming that the "Fullerton" did not give proper fog signals, the collision would have occurred even if the "Transit" had proceeded at a speed of 3 or 4 knots per hour. It might have been postponed a few seconds; but evidently the fog was so thick that all the six men on the "Transit", although straining their eyes for the "Fullerton's" lights, could not discover them until it was too late to avoid a collision.

When the "Fullerton's" light was discovered, the fog was so dense, it could not be seen more than a couple of hundred feet anyway. * * * it might have been 200 feet, or it might not have been that much. (Ap., p. 75.)

Q. When you first perceived the light of the "Fullerton", Captain, how much time elapsed from the moment when you first perceived the light to the time when the vessels came together, in your opinion, generally?

A. *It might have been 20 seconds; it might have been 30 seconds.* It was a very short time, I know that is all. (Ap., p. 83.)

Again he says:

There was not distance to do anything; there was not time to even back the engines without endangering the lives of the engineers.

Q. If the engines had been reversed, would that have made any difference?

A. Not a particle. I don't believe they would have reversed; they might have. (Ap., p. 84.)

The evidence of Reichelt, first officer, is to the same effect:

A. It was only just about 2 or 3 minutes after (that) we heard the sound of the slip-bell that we located, our second officer reported a bright light on our port bow right on board, and immediately after the report was given I could see the bright light almost with the level of the pilot house, about 3 or 4 points on my port bow. I was on the port side, it was nearest to me, and almost on a level with the pilot house windows.

Q. How near was it in a general way?

A. Well, that is pretty hard to tell how near it was, but the distance was *very short, I should say about 150 feet*, maybe a little more, and it might be a little less; it is a pretty hard thing in a fog, in a dense fog like that, to gauge the distance within a few feet. (Ap., pp. 91, 92.)

The Captain, he put his helm hard-aport and gave them the jingle-bell, and in the meantime when he gave them the jingle-bell, I seen the bowsprit of the "Fullerton" coming right for the pilot house, and I told the Captain, I said, "for God's sake, stop your engines entirely". We were right square across the "Fullerton's" bow, or the vessel's bow. I didn't say the "Fullerton's" bow, but the vessel's bow, and he gave them two bells in the engine room; that means for to say to stop. Then the time was so short that I dont think the engineer had time to give half a turn or quarter of a turn on the engines. (Ap., pp. 91, 92.)

Assuming now that the "Transit" could, and would have traveled only four knots an hour, the situation was such that the vessels would have come together anyway; in other words, her speed was not a contributing cause. Appellant seems to con-

tend that, if the "Transit's" steerage way cannot be reduced to a rate of speed which would have made this collision impossible, her owners should cease running her in a fog. It is well settled that the large ferries necessary to carry on the traffic of a port like that of San Francisco have a right to run in a fog, and it must be remembered in this connection that, when the "Transit" left her Oakland slip, the fog was light. What could she have done when she entered into the dense belt on this side of the bay? The chances of colliding with other vessels were obviously minimized by her continuing her course under steerage way. If the "Fullerton" had given her people warning, by sounding her fog signals, the collision would have been avoided. Her speed was not a factor in the collision.

c. *If there was error in the manoeuvres of the "Transit", the rule in extremis applies.*

We have shown that when the "Transit" lookouts first saw the light of the "Fullerton", a situation of extreme danger had arisen. It is impossible to say with certainty that his first order, then given, to port the helm and go ahead full speed was a mistake; for, as the vessels came together, the "Transit" would have struck the hull of the "Fullerton" on the starboard bow, had she not promptly ported her helm—evidently under the first impression that there was time "to make the boat swing past her" (Ap., p. 52). When the captain of the "Transit" saw that he was too close, "I

knew the best thing to do would be to stop the boat entirely" (Ap., p. 52). Judge Dietrich held the view that he was not warranted in the conclusion that there was a want of care in the navigation of the "Transit" immediately prior to the collision. But even if it were otherwise, the rule *in extremis* clearly governed the situation. The words of the Court in

The Queen Elizabeth, 122 Fed. 406, 409 (C. C. A., 2nd Circuit), apply:

"When the master of a vessel is confronted with a sudden peril, caused by the action of another vessel, so that he is justified in believing that collision is inevitable and he exercises his best judgment in the emergency, his action, even though unwise, cannot be regarded as a fault. 'The judgment of a competent sailor in extremis cannot be impugned.' *The Oregon*, 158 U. S. 186, 204; 15 Sup. Ct. 804; 39 L. Ed. 943. It is the duty of the Court, as far as possible, to place itself in the position of the master and to endeavor to interpret the rules of navigation in the light of the perils and perplexities which surrounded him at the time—the impending danger, the excitement of the moment, the necessity for immediate action. Where a navigator of experience and good judgment acts, in such circumstances, his action, if within the limits of reasonable judgment and discretion, cannot be imputed to his vessel as a fault. If he acts upon his best judgment at the time, it is sufficient even though subsequent judicial investigation may show that he might have chosen a more prudent course. A master who the next moment may be sinking with his ship and crew cannot be expected to display the utmost coolness and

deliberation. The Dimock, 23 C. C. A. 123, 77 Fed. 226; The City of Augusta, 25 C. C. A. 430, 80 Fed. 297; The Iron Chief, 11 C. C. A. 196, 63 Fed. 289; The Havana (D. C.), 54 Fed. 411; The Robert Healy (D. C.), 51 Fed. 462."

It is hardly necessary to answer appellant's argument that the "Transit" violated Rule 16 of the Inland Rules. Clearly this rule does not apply to the case at bar, because the evidence shows overwhelmingly that the "Transit" did not hear the fog-signal of the "Fullerton". We contend that the evidence shows by great preponderance that the fog-signal of the "Fullerton" was not sounded properly and that this is the cardinal fact causing the collision.

Appellant's argument that the "Transit" was negligent in not stopping and reversing her engines the moment when the "Fullerton's" light was seen, has been answered. The manoeuvres of the "Transit" after that moment were acts *in extremis*. She was prevented from taking timely measures to prevent collision by the "Fullerton's" failure to give fog-signals.

It is difficult to understand the argument of appellant criticising the master for "not devoting his undivided attention to the duty of master in her navigation", in view of the facts of the case. How could the master better devote his attention to the navigation of a ferry than by personally keeping his hand on the apparatus by which the whole navigation of the boat is every instant con-

trolled? If he had been away from the post of the pilot; if he had been in any other place except at the helm and had, in the dense fog, entrusted his boat to the navigation of a subordinate, the criticism would be justified. But he was at the most critical post where instant action may at any time be required, and in a situation where critical seconds are saved which would be lost if his will had to be first communicated by orders to a subordinate. He had had experience as a master of ferry boats on this bay for thirty-three years, and could not have fulfilled his duty more perfectly than by assuming personally the most critical post in the navigation of the boat. In that post his attention is not monopolized by the compass before him, although he steers by course; his eyes have still abundant time to attend to lights or objects in or near his course. He was stationed in the one position where he could, in an emergency, give immediate signals to the engineer in charge. Seconds of great importance, which would in any other position have been lost, were saved by the fact that he was and remained in the critical post.

On this point the language of the Court in

Wright & Cobb Lighterage Co. v. New England Nav. Co., 189 Fed. 809, 814 (S. D.

N. Y.), a case of a collision between the ferry-boat "Pierrepoint" and a moored barge in New York harbor, applies to the facts of this case:

"I cannot see that the Pierrepoint was guilty of any fault. Ferry boats cannot tie up in a

fog. Public interests require that they should make their regular trips even in very thick fogs. On this trip the Pierrepont was navigated carefully and prudently. The Captain, a licensed pilot of long experience, was at the wheel. * * * He proceeded slowly, sounding fog signals. * * * He knew substantially where he was. He could hear the big bell rung in fogs off the ferry entrance. * * * The fog was so dense that the light on the float could not be seen until it was so near that a collision could not be avoided. No one on the Pierrepont heard any bell on the New Haven tug. I think it doubtful whether any was rung. If rung, it was admittedly a small bell, and was not heard. In short, I see no ground for any charge of fault in the Pierrepont. The masters of New York ferry boats are generally experienced pilots, and careful, faithful men, who have surprisingly few collisions in view of the crowded condition of the harbor. They have to run in fogs; and there is no justice in holding them responsible for collisions in thick fogs when they have done their best."

It is respectfully submitted that the evidence shows affirmatively and by great preponderance, that the "Transit" was without fault, and that she could not have prevented the collision by the exercise of care, caution and maritime skill. The evidence also shows by overwhelming preponderance that the "Fullerton" remained lying at anchor in the fairway of the "Transit", although she had received distinct warnings of the dangers which she defied; and that her fog-signals were, if sounded at all, not sounded in such a manner as to be audible

to an approaching vessel so as to enable the latter to avoid her. The "Fullerton" was solely responsible for the collision.

We therefore respectfully submit that the decree of the District Court, dismissing the libel of cross-appellant, should be reversed, and that the cause should be remanded to the District Court with instructions to enter a decree in favor of libelant and cross-appellant, Southern Pacific Company, and against cross-libelant and appellant, Mission Transportation and Refining Company, in such sum, with interest and costs, as libelant and cross-appellant shall prove to have been damaged by reason of the collision between the said ferry steamer "Transit" and said barkentine "Fullerton", together with such other and further relief as in law and justice said libelant may be entitled to.

San Francisco, October 25, 1913.

Respectfully submitted, *E. J. Foulds,*

LOUIS T. HENGSTLER,

Proctor for Cross-Appellant.

No. 2262

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MISSION TRANSPORTATION AND
REFINING COMPANY (a corpora-
tion), claimant of the Barkentine
"Fullerton", etc.,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellee.

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE.

The faults charged by appellee and cross-appellant in its reply brief against the "Fullerton" are three, viz.:

Improper anchorage, insufficient night watch, and failure to ring the required fog bell.

THE ANCHORAGE OF THE "FULLERTON".

It is contended that the "Fullerton" was improperly anchored in that she was within the "fairway" of the

“Transit”, though the positive assertion is not made that she was anchored within the forbidden anchorage zone. To lay a foundation for such contention, proctors for appellee of necessity inferentially cast aside, as unworthy of acceptance, the testimony of the “Fullerton’s” witnesses as to the anchorage of their vessel, indicated by the locations made upon the chart offered in evidence, because, as proctor states it,

“These witnesses are all interested in locating the anchorage place of the ‘Fullerton’ as far away from the forbidden anchorage ground established by the State Harbor Commissioners as possible”.

It is true that each witness placed the anchored position of the “Fullerton” at a different point, but their very failure to agree demonstrated an independency of judgment and honesty of purpose in their efforts to point out her position. If, after the period intervening between the collision and date of trial, each witness had indicated the same position upon the small scale government chart, it might well have been viewed with suspicion. But not so, when the men, all present in the court room while the others testified, frankly disagreed in their designations upon the chart.

The point is that though the witnesses may have disagreed as to the exact place of anchorage, that is distance and direction off shore, say from the ferry slip, they were in accord upon the fact that she was to the south of the southern boundary of the forbidden anchorage zone, and was, at the time of the collision, and had been for three months previous

thereto, in the same position within permitted waters. Nor is there an iota of evidence in the record to the contrary, for *the bearing of the "Fullerton", claimed to have been taken by the master of the "Transit" three or four days prior to the collision, corroborates the fact that she was not within the forbidden zone.* This is impliedly admitted by proctor, for he states in his brief (p. 10) that the theory of the "Fullerton" seems to be that she was without fault as long as she was not actually in the zone of forbidden anchorage, and that all waters not forbidden are permitted waters.

The master of the "Transit" testified that three or four days prior to the collision, he took the bearing of the "Fullerton" and ascertained that she lay *east northeast from the ferry slip, 1000 yards off.* Though she had been anchored in the same place for the three preceding months, the master refused to admit that he had ever noticed her presence except during the three or four days before the collision. He explained this on the theory that she had during that time drifted from a previous anchorage to within that distance from the established fairway, though all of the witnesses on the "Fullerton" testified that she had not materially altered her position from the time she first dropped anchor. It is pertinent to inquire how the master of the "Transit" knew of her alleged drifting, if he did not know of her earlier anchorage?

The bearings claimed to have been taken by the master, when laid down upon the chart, show the position, east northeast and 1000 yards off the slip, to

be, as nearly as can be measured, *1000 feet south of the southern boundary of the forbidden anchorage zone* (see chart appended). With the "Fullerton" 235 feet long, anchored with sixty fathoms of chain, one thing is thus demonstrated, on the testimony of the "Transit's" master, to say nothing of the "Fullerton's" witnesses, and that is that *when the "Fullerton" swung to the flood tide on the night of the collision, she was not within 1000 feet of the fairway established by the State Board of Harbor Commissioners*. Nor do proctors for appellant make contention to the contrary, for in their libel, drawn nearly nine months after the collision, no charge is made that the "Fullerton" was anchored within the forbidden zone.

How, then, can it be urged that the "Fullerton" was improperly anchored? It is true that certain of her witnesses testified that *sometimes* the "Transit" would pass close to the "Fullerton" when the latter was lying to an ebb tide, *i. e.*, with her stern toward the fairway, but that fact does not establish that the "Fullerton" was improperly anchored at the time of the collision, for to pass so close to the "Fullerton", it is manifest, on her master's testimony, that *the "Transit" must then have been without her fairway, to the southward of the forbidden anchorage zone*. That her navigation was erratic in this respect is shown by the fact that once she crossed the "Fullerton's" bow on the ebb tide (Supp. Apostles pp. 17-18); sometimes on a flood tide she likewise came close to the "Fullerton" (Supp. Apostles p. 17), whereas usually on a flood tide, such as was prevailing at the time of the collision, she passed

a mile to the northward (Apostles p. 145). Whether ebb or flood, the "Transit" apparently followed no defined approach to the slip, even consistent with the prevailing tide.

Examination of the chart (Claimant's Exhibit 2), a copy of which, with notations thereon illustrative of argument, is appended hereto, will show that the forbidden anchorages were established by the Harbor Commissioners largely as lanes for the ferries traversing the bay, and those passing along the San Francisco water front. One forbidden zone protects the ferry running from the slip at Point Richmond (Santa Fe Ry. Co.) to the main ferry slip on the San Francisco water front; another from the Key Route (S. F., O. & S. J. R. R.), Southern Pacific mole (S. P. R. R. Co.), Western Pacific mole (W. P. Ry. Co.) and Alameda mole (S. P. R. R. Co.) to the main ferry slip at the Ferry Building; a third forbidden anchorage is that protecting the ferries running to the Berry street wharf, and the 16th street wharf to which the "Transit" was bound at the time of the collision; a fourth was established three days after the collision, though the Harbor Commissioners' charts were not published until March, 1910, following the completion of the new Western Pacific slip at the southerly end of the water front. Thus, ample lanes of travel across the bay and for 500 yards out from the wharves along the water front, were established, at the time of the collision, within which no vessel was permitted to anchor. The fairway so set aside for the use of such ferries as might transport freight to the 16th street

slip, was bounded on the south by a line extending from the wharf approximately 300 feet south of the slip, in a general northeasterly direction to the Alameda mole and, on the north, by a line from the entrance to Oakland Creek to a point on the San Francisco shore known as Hay wharf, three-quarters of a mile to the northward of the slip, and having a width of 4500 feet opposite the point where the "Transit's" master located the "Fullerton".

Such a fairway, however, so goes the argument of proctor, was not sufficient for the "Transit", as he asks the court to hold the "Fullerton's" position improper because the "Transit" did not keep within this lane, three-quarters of a mile wide, but sometimes, on flood as well as on ebb tide, passed close to the "Fullerton", a thousand feet outside of the established fairway. To condemn the "Fullerton" as being improperly anchored, they would thus have the court *add* to the broad fairway, already established by governmental authorities, such further zone as the "Transit" was sometimes carried into by her erratic navigation.

Such additional width to the southern side of the forbidden zone was unnecessary for manifest reasons, as the fairway extended far enough to the northward ($\frac{3}{4}$ of a mile) to allow the "Transit" an unobstructed opportunity to keep up against a flood tide, so as to overcome the southerly drift of such tide as she crossed from Oakland to her San Francisco slip. On an ebb tide, the drift would be to the northward, and as the "Transit" crossed from Oakland to the

slip, she would be forced to run against the tide, as the Oakland mole, from which the ferry started, was to the northward of the 16th street slip. Thus, in crossing to the slip, on an ebb tide, the "Transit" was in no danger of being carried by the tide to the southward of a line drawn from Oakland to the slip. On the contrary, she would be carried to the northward, and, by stemming the tide, could make the slip without being forced to the southward of the fairway. The location, by the Harbor Commissioners, of the southern boundary of the fairway, 300 feet to the southward of the slip, was, therefore, sufficient to enable the "Transit" to reach the slip on the ebb tide. If she went beyond that line, it was voluntary on her part, and not required by any of the exigencies of navigation on such a tide. If, then, sometimes on an ebb tide, the "Transit" came close to the "Fullerton", anchored to the south of the fairway, it was not because she did not have ample room to make her slip, but because of erratic navigation.

On the other hand, a flood tide naturally drifted her to the southward, and, to give her opportunity to overcome its influence, the forbidden anchorage was extended far to the northward of the slip, so that, in laying her course from Oakland mole, the "Transit" had an unobstructed fairway to keep to the northward, and thus offset the southerly set of the tide. It was for the purpose of offsetting the drifting effect of the flood tide that the "Transit's" master ordinarily laid his course S. W. by S., and on the trip of the collision S. W. $\frac{1}{2}$ S., from Oakland mole, thus demonstrating the practical

wisdom of the Harbor Commissioners in laying out the fairway with its greatest area of forbidden anchorage to the northward of the slip.

Were any of the places from which the "Transit" always departed on the Oakland shore, to the southward of the slip, or even opposite it, it is at once apparent that the fairway would have required extension to the southward, but situated as they were, to the northward, the Harbor Commissioners correctly laid out the fairway when they located the greatest area of the forbidden zone to the northward of the slip. In this manner, they provided an ample and safe fairway for the "Transit's" approach to the 16th street slip, whatever the tide might be.

There was, then, no reason so far as the necessities of the "Transit's" navigation were concerned, why the fairway set apart for her use was not sufficient, or why the anchorage of the "Fullerton" was not proper at the time of the collision, even granting that she was within the distance of the forbidden zone testified to by the "Transit's" master. Had the anchorage of the "Fullerton" been deemed a menace by those on the "Transit", if properly navigated, or imperiled the safety of the "Fullerton", certainly some warning would have been given by the "Transit" to the "Fullerton", or some complaint thereof made to the proper harbor authorities. But not a word.

The fact that on an ebb tide the "Transit" sometimes voluntarily came close to the "Fullerton", outside of the forbidden zone, is no reason for holding that

the latter was there improperly anchored. If so, then the establishment of the forbidden anchorage was meaningless, as the proper anchorage would be determined not by authorities having supervision of the harbor, but by the erratic navigation of the "Transit".

It is respectfully submitted that a fairway having been established by the Harbor Commissioners, within which anchorage is forbidden, and without which anchorage is permitted, a vessel is not to be condemned for anchoring without the forbidden zone, because a ferry, having the privilege of the fairway, sees fit to leave the lane established for her benefit and voluntarily pass close aboard the anchored vessel. The establishment of the fairway, within which the ferries might pass without encountering anchored vessels, equally conferred upon all other vessels anchored without the zone, the same privileged character. Expressly barred from anchoring within long established areas, designated by rules and published charts as "forbidden anchorages", ample for their purposes, it necessarily follows that the waters outside such forbidden zones were proper anchorages.

The Ophelia, 44 Fed. 941.

The fact, then, as urged by proctor, that *sometimes*, which is not shown to have been confined to the two or three days prior to the collision within which the master of the "Transit" would only admit having knowledge of the "Fullerton", the "Transit" passed close to the "Fullerton", does not establish the improper anchorage of the "Fullerton", so as either to condemn her, or

to bring her without the operation of the rule raising a presumption of fault against a moving vessel in collision with one that is anchored.

THE PRESUMPTION OF FAULT.

The cases relied upon by proctors to remove the "Transit" from a presumption of fault for having collided with the anchored "Fullerton", are based upon facts manifestly dissimilar to those in the case at bar, and formulate no rule which can be invoked against the "Fullerton".

For instance, the "Talisman", in

The D. S. Gregory, Fed. Cas. 4102,

was not condemned, though she was about in the usual track of ferry-boats crossing the Hudson River, *as she was not within a forbidden zone*. Her position being known to the ferry, the court held that it was the latter's duty to keep clear.

In

The Bedford, Fed. Cas. 1216,

the anchored schooner was condemned, however, *because she was anchored within a forbidden zone established by an ordinance of the City of New York, forbidding anchorage within 60 yards of a direct line between the landing places of the public ferries traversing the river, regarding the unlawful character of which anchorage she had been previously warned by the master of the colliding ferry*. In the case at bar, the established fairway was 4500 feet wide opposite the anchor-

age of the "Fullerton", and the latter was over 300 yards outside of it.

In

The Rockaway, 19 Fed. 449,

the brig "Survivor" was not condemned, *because she was anchored within permitted waters*, although she was within 150 yards of a forbidden zone.

In

Graves v. Carferry Transportation Company, 183 Fed. 378,

cited by appellee, *no forbidden zone had been established*, but the court expressly found that the schooner "Wilson" was improperly anchored in a *navigable channel*, and was not displaying the lights required by law. The case is not in point with the one at bar, for here a broad zone was specially set aside for the use of the ferries, outside of which the "Fullerton" was anchored, a situation entirely different from that of improperly anchoring a vessel in a navigable channel. And, even in that case, there was a strong dissent on the part of one of the judges of the court of appeals.

Proctor also cites the case of

Ross v. Merchants & Miners Transportation Company, 104 Fed. 302,

in support of his citation that no presumption of fault is to be raised against the "Transit". Examination of the facts readily show that the scows were moored together in a string and anchored so close to a *narrow channel* that the incoming tide naturally threw *them*

across the middle of the channel. The court remarked in the omitted portion of the excerpt quoted by proctor:

“With reference to vessels at anchor, where properly anchored, the rule is strict in their behalf, but as to positions for anchoring there is no mystery. The same rules of obligation to use care (that is, to avoid endangering the usual paths of commerce) apply as apply with reference to obstructing any other highway unnecessarily.”

Had the “Fullerton” been anchored in, or so that she swung into, the forbidden zone, then she would have been subject to the rule by which the scows were condemned for being anchored where they swung across the narrow, dredged channel. But the very fact that the “Fullerton” was admittedly out of the established fairway, makes applicable to her case the rule which the court recognized when it said that

“with reference to vessels at anchor, where properly anchored, the rule is strict in their behalf
* * *”

Similar facts also distinguish

The City of Birmingham, 138 Fed. 555,

for the dredge was held in violation of the Act of Congress, March 3, 1899 (U. S. Comp. St. 1901, p. 3543), making it unlawful for vessels to anchor in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft, as it was found by the court to have been so anchored in a part of a navigable channel, at best difficult of navigation, as to obstruct the passage of other vessels. It was not the case of a vessel anchored in a large navigable bay

beyond the boundaries of long established fairway, sufficient in width for vessels carefully navigating it.

So with

The Milligan, 12 Fed. 338.

She was anchored slightly off the center of, but still within, a narrow navigable channel.

We respectfully submit, therefore, that, with the "Fullerton" anchored out of the established fairway, there is nothing to justify her condemnation as improperly anchored, or to remove the "Transit" from the presumption of fault raised against her for having come into collision with the anchored "Fullerton".

THE WATCH ON THE "FULLERTON".

It is said by proctor that the duties of care imposed upon the "Fullerton" were of the highest order. We, of course, admit that a proper lookout was required to be maintained, sufficient lights kept burning, and the fog bell rung as prescribed by law. The cases cited by proctor, however, lay down no rule which would condemn the "Fullerton" as in failure of full compliance with those obligations.

The Ailsa was held in fault because of her anchorage in the channel for steamers bound out of the port of New York, and in *The John H. Starin*, the responsibility for the collision was found to be with the schooner, in that she failed to maintain the lights and lookout required of vessels anchoring in the center of the channel

usually taken by all New York steamers leaving New Haven harbor.

The rules, as stated in *The Europe*, *The City of Birmingham* and *The Clara*, are unquestioned when the facts make them applicable, but there is nothing in any of them which points to a fault on the part of the "Fullerton" in the fulfillment of the obligations imposed upon her. On the contrary, the evidence shows affirmatively the proper performance of every duty. In his effort to find some fault on the part of the "Fullerton", proctor indulges in general criticisms of a petty character of the watch maintained, which are unsupported by any facts shown in the record. For instance, much is said about the day watchman who suffered from the misfortune of being blind in one eye, the youthfulness of the man on watch at the time of the collision, the character of his duties, the whimsical nature and fitness of a gasoline engine, the unreliability of electric lights, etc., etc., but the fact remains that the "youthful" watchman was 25 years of age, had been to sea for over four years, and proved himself of qualifying experience and intelligence for the duties he was called upon to perform. Criticism is likewise made of the fact that he might have been compelled to call the other watchman if certain things had happened which did not occur, a matter entirely foreign to the question of contributory fault. Withal, however, the record clearly establishes that the lights were continuously displayed, and that the watchman was alert and adequately performed the duties resting upon him.

There remained but one other act to constitute a complete fulfillment of the obligations imposed upon the "Fullerton" as an anchored vessel, to wit, ringing the fog bell. If that was done, then certainly she was not guilty of any fault which even remotely contributed to the collision.

THE "FULLERTON'S" FOG BELL.

Proctor makes strenuous effort to avoid the effect of the District Court's finding that the positive proof of the ringing of the "Fullerton's" fog bell was not overcome by the negative testimony of those on the "Transit", who asserted that they did not hear it, by contending that what the court characterized as negative testimony, was, in fact, positive, and was, by reason of a larger number of witnesses, of greater weight. *Moore on Facts*, Sec. 1198, is cited to support the contention. A reading of the author's statement in its entirety will show, however, that it does not lay down the principle asserted by proctor, that the direct denial by witnesses who could well have heard signals if they had been given is generally held to be positive in character, equally with the positive testimony that the signals were given, but the author does say that the denial testimony is positive in character equally with the testimony that the signals were given, *so as not to justify taking the case from the jury.*

Furthermore, the author, in the section from which proctor's excerpt was taken, was discussing land signals,

to wit, locomotive and electric car signals (see page 1340), and not fog signals. Of the relative weight to be given positive and negative testimony of fog signals, the author states a different proposition to that quoted:

“Upon the disputed question whether a vessel’s signals were given—fog horn, bell or whistle—very little weight is ever given to testimony that they were not heard, when opposed to positive testimony by credible witnesses in position to know the facts. * * *.” (Section 1194a.)

It follows, therefore, that the District Court contravened no principle of law when it found that

“although the greater number of witnesses gave negative testimony in support of libellant’s contention that the ‘Fullerton’s’ bell was not properly sounded, it is not sufficient to overcome the positive statements of the three men who were upon the ‘Fullerton’ to the effect that the bell was being rung in the manner required by the rules.”

Such finding of fact having been made, it will not be disturbed by this court under the well known rule stated in

The Bailey Gatzert, 179 Fed. 44, 48.

In his effort to get away from the District Court’s finding, proctor endeavors to adduce from the record that but two, not three, witnesses gave positive testimony of the ringing of the bell. The evidence which he would discard is that of the day watchman, Olson, for, after quoting the witness, proctor concludes that the testimony does not show that the witness heard the bell of the “Fullerton” at any time during the critical moments before the collision.

The injustice of such conclusion quickly appears from the reading of the entire testimony of the witness. What the witness was referring to in the meagre part quoted by proctor was the time from which he heard the fog bells of the "Fullerton." That proctor so understood was manifest from the following question which he subsequently propounded to the witness:

"Q. From 9 o'clock on you heard the bell on the 'Fullerton', did you?

A. Once in a while.

Once in a while foggy and once in a while clear."

(Supp. Apostles, p. 60.)

His testimony on direct examination, however, shows how unmistakably the witness heard the "Fullerton's" bell as the "Transit" approached:

"Q. Do you know whether or not the bell on board the 'Fullerton' was ringing?

A. The bell on the 'Fullerton' was ringing.

Q. Was ringing?

A. Yes, sir, was ringing.

Q. What noise did you hear when you awakened?

A. The noise from the 'Transit' paddle-wheels and the whistle.

Q. How often would you hear the bell of the 'Fullerton's'?

A. The bell on the 'Fullerton', about every minute was ringing.

Q. Did you see the 'Transit' at all?

A. Seen her. I looked out through the port hole.

* * * * *

Q. Are you positive, or is it merely a matter of guesswork that the 'Fullerton's' bell was ringing in that fog?

A. The 'Fullerton's' bell was ringing."

(Supp. Apostles, pp. 57-59).

The fact, as established by the record, is that the "Fullerton's" bell was sounded, and the circumstances all point to its having been heard and mistaken by those on the "Transit". Indeed, proctor makes no attempt to reconcile the statement of the "Transit's" master that while he usually heard the slip bell 6 or 7 minutes off, this night he heard it 15 minutes distant, and that while he could only hear the slip bell when straight out from the slip, this night, if heard 15 minutes off, the sound must have reached far to the northward, on the course (S. W. $\frac{1}{2}$ S.) the "Transit" was steering. Proctor makes no explanation of the fact that the master heard the "bell" right straight ahead while steering S. W., and that shortly afterward the "Fullerton's" light was observed in the same direction, a course, as shown by the appended chart, which could not have made possible the hearing of the slip bell in the direction from which the sound of the ringing bell came. Nor does proctor have a word to say as to why the slip bell, if ringing immediately before the collision, was not heard afterwards, though the "Transit" had not reached the slip, and at the point of collision was admittedly nearer the slip than when the bell was first heard. The slip bell was not heard on the "Fullerton" (Supp. Apostles p. 17) although she was more in range and closer to it than the "Transit" could have been when 22 or 23 minutes out from Oakland. If it were rung, why was the employee of appellee not called to testify to the fact, and explain the reason for its ceasing on the happening of the collision?

These facts, coupled with the positive testimony of those on board the "Fullerton" that the bell was rung, conclusively demonstrate as circumstances can, that the "Fullerton's" bell was heard, but mistaken, doubtless because those on board the "Transit" erroneously assumed that they were farther to the northward, beyond the range of the "Fullerton's" bell.

Such testimony and such circumstances cannot be answered by the suggestion, apparently original with proctor, for it finds no support in the record, that the bell was rung by the wrong kind of a cord, or that the distance at which the bell could be heard was not established. The type of bell, its arrangement and the manner in which it was rung, was fully described, but its efficiency was unquestioned on the trial.

In the light of all the facts, therefore, no fault on the part of the "Fullerton" is to be found, but, on the contrary, she was complete in the fulfillment of every duty imposed upon her as an anchored vessel.

RESPONSIBILITY FOR THE COLLISION RESTS UPON THE "TRANSIT".

We confess our inability to see wherein *The Hudson* (F. C. 6829), cited by proctor, is decisive. There, the Revenue Cutter "Cuyahoga" was held in fault for not giving the fog signal required by law. She was anchored in too close proximity to what was, on the ebb tide, the usual route of the colliding ferry in making her slip. There was not, as in the case at bar, any

fairway for the ferries, established by governmental authorities, outside of which the "Cuyahoga" was anchored. Then, too, she was repeatedly warned by the ferries of the danger of her position, which requests to move were met by insulting refusals even after one collision had occurred. None of the faults which condemned the "Cuyahoga" are to be attributed to the "Fullerton".

It is unnecessary to further comment upon the excessive speed of the "Transit", except to point out the fallacy of the reasoning by which proctors seek to escape condemnation for a speed, which not only has been condemned as excessive *per se*, but which was in violation of every reason upon which the rule against immoderate speed is based. It may be true that the master steered the same course that night which he had for 35 years, but that in no way granted him the right to run at an immoderate speed, for though he knew he had a broad fairway, the fact that he brought up on the "Fullerton", to the southward of the fairway, when he thought he was far to the northward of it, shows how unadvised the master was as to the actual course of the "Transit".

If the rules laid down in *The Pennsylvania* and *The Martello* are to be applied, the "Transit's" speed was, *per se*, excessive. Proctor, however, makes a valiant effort to escape the effect of *The Martello* by suggesting, in effect, that while the Supreme Court held a speed of five and a half to six knots excessive, on account of the *peculiar circumstances* of the case, it is inapplicable to the case at bar because the "Transit" was

“off the frequented paths of commerce, in quiet Mission Bay, where, in the middle of the night, she was, in all probability, the only moving thing and had no dangers to encounter except the vessel anchored in her fairway.”

We may search the record in vain for any evidence to support the declarations of proctor. For all that appears, and it is as likely to be as true as proctor's suggestion, shipping of all kinds and character may have been moving on the bay across the course of the “Transit”, for we are unaware that vessels, entering and leaving and navigating about the great harbor of San Francisco, cease their operations with the coming of night. If the number of vessels possible to be encountered were the determining factor, doubtless *The Martello* upon the ocean would have been privileged with a higher speed than that permitted a vessel in San Francisco harbor. The point is that no reason exists for not applying to a vessel navigating in a harbor of one of the world's great ports, the same requirement of speed as to a vessel approaching, on the high seas, the entrance to New York harbor.

But even assuming that the suggestions of counsel distinguish the case, the speed of the “Transit”, 7 knots, still falls within the condemnation of *The Pennsylvania*, for the latter was held in fault for that identical rate while navigating the high seas, 200 miles outside of Sandy Hook. If that was excessive, we are at a loss to understand how a similar rate of speed in the harbor was not undue!

Granting, however, that the speed is not to be condemned, *per se*, still it comes within the reason of the

rule against immoderate speeds. Judged by *The Nacoochee*, and all that long line of cases wherein the same rule has been restated and applied by the Supreme Court, the "Transit" was grievously in fault, for she was admittedly traveling at such a speed that she could only be stoped in 800 or 900 feet, in a fog so dense that she could only see the "Fullerton" 200 feet. Her speed, then, was undue if the rule required her to maintain only such a rate as would enable her to come to a standstill by reversing her engines at full speed, before she should collide with a vessel which she should see through a fog.

Proctor impliedly admits the fault of the "Transit" if that be the test of moderate speed, but he denies the rule by suggesting that the Supreme Court, when it used the words "which she should *see* through the fog," in *The Nacoochee*, meant "which she should *see or hear* through the fog." Not only has the rule been stated too often in the same words to admit of controversy as to its meaning, but the suggestion of proctor reduces itself to an absurdity. Take, for instance, the "Beaver"-
"Selja" case, decided by the District Court for the Northern District of California, where the record showed that the "Selja" heard the "Beaver's" whistle fifteen minutes before the collision. Can it be urged that moderate speed only required that the "Selja" be going at such a rate that she could be stopped in fifteen minutes? Hardly, for that would make possible full speed in a fog where the vessels might only be able to see each other a ship's length off. The vagaries of sounds in the fog have been often commented upon by

the courts. How, then, could any master tell from what distance he might be hearing a fog signal? If he could not, there would be no criterion by which to safely regulate the speed of his vessel, for the same speed might be immoderate as to one approaching vessel, and moderate as to another, depending upon the fog penetrating qualities of the approaching whistles. By such a rule, two vessels, duplicates as to design, size and power, might be traveling at the same speed in the same fog, and one be held in fault, and the other free of blame, by the circumstance of the latter having the louder whistle. It but shows how unsound is the construction which proctor would have this court give to the rule laid down by the Supreme Court in terms which admit of no ambiguity.

The hypothetical case offered by proctor to illustrate the reason for a modification of the rule formulated by the Supreme Court, only serves to demonstrate the wisdom of the rule as now applied. If a fog were so dense that two vessels could only see each other 10 feet apart, it was time they stopped, for manifestly their navigation could be continued only at the positive peril to life and property.

The reason for the rule requiring reduction of speed is to obviate just that possibility.

It is no defense that the "Transit" could not travel slower and keep steerageway, for the Supreme Court has adversely spoken upon that point in *The Pennsylvania*, 19 Wall. 125, and the same rule has been applied in the English courts.

The Campania, 9 Asp. M. C. 151.

There is neither showing nor reason why this freight carferry should, because of her construction, be removed from the operation of the rule which governs every other vessel. True, she was made to run just as other vessels, but if she could not do so in a fog, at a speed which did not endanger the safety of others, and in conformity to the rules governing all vessels, it was her duty to remain dormant until the fog passed.

It may be, as said in the case of

*Wright & Cobb Lighterage Co. v. New England
N. Co.*, 189 Fed. 809, 814,

cited by proctor, that public interests require that ferry boats make their regular trips even in very thick fog, but that constitutes no reason for holding that a *freight* carferry, of such design and construction that at lowest speed she cannot be stopped in less than 800 feet, and then not immediately reversed from ahead to full speed astern, may run at a speed in positive violation of the rules prescribed by the Supreme Court in its numerous decisions.

We respectfully submit that the decree of the District Court should be reversed in accordance with the prayer of our opening brief.

Dated, San Francisco,
December 6, 1913.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

*Proctors for Appellant and
Cross-Appellee.*

MAP SHOWING



26. Journal of "society" of friends. All were heavily



